United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4266

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,	)	
Petitioners,	)	
v.	)	Docket No. 75-4266
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	
and	)	
CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,	)	
Intervenors.	)	

On Petition to Review And Set Aside An Order Of The
National Labor Relations Board
And
On Cross Application By The National Labor Relations Board
For Enforcement Of Its Order

BRIEF OF RESPONDENT-INTERVENOR
TWIN EXPRESS, INC.

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Dated: February 23, 1976

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COUNTERSTATEMENT OF ISSUES

1. Does substantial evidence support the Board's finding that the actions of, and agreement between, the New York Shipping Association (NYSA) and the International Longshoremen's Association (ILA) designed to acquire for ILA labor all the work of stripping and stuffing all local less-than-trailer load (LTL) containers originating at or destined to any point within a 50-mile radius of the Port of New York,

violate Sections 8(b)(4)(ii)(B) and 8(e) of the National Labor Relations Act, as amended (the Act) (29 U.S.C. §§158(b)(4) and 158(e)).

2. Does substantial evidence support the Board's subsidiary findings that:

A. The work of stripping and stuffing containers at off-pier premises was work traditionally performed by off-pier consolidators -- such as the two intervenors here: Consolidated Express, Inc. (CFI) and Twin Express, Inc. (TEI) -- at their own off-pier premises and by non-ILA labor.

B. Whatever work traditions the ILA may have at the pier, they do not embrace that work traditionally performed by such off-pier consolidators.

C. Any claim the ILA may have had to such off-pier consolidation work was abandoned under the terms of the 1959 NYSA/ILA Agreement pursuant to which, as a quid pro quo for such abandonment, the ILA received royalty payments on all containers stripped or stuffed anywhere off-pier by non-ILA labor.

3. Are the Board's conclusions required by, consistent with, or contrary to the Supreme Court's National Woodwork decision.

A. Was the Board justified in focusing on the off-pier consolidation work tradition where, as here, such off-pier work had traditionally been performed and where consolidation work itself had never exclusively been performed by ILA labor.

B. Was the Board justified in concluding: (a) that the ILA's activity here had manifest secondary objectives, as its purpose was not simply to eliminate off-pier consolidators but to monopolize for ILA labor all the work previously performed by such consolidators; and (b) that such activity therefore was not only not protected under

the work preservation doctrine of National Woodwork but it was specifically held therein to be unlawful.

STATEMENT OF THE CASE

A. Introduction

Relying on certain so-called container rules, first adopted between the ILA and the NYSA in a collective bargaining agreement in 1968 and then amended in early 1973, the ILA/NYSA are presently seeking to require that all containers heretofore consolidated at off-pier premises by off-pier consolidators like CEI and TEI be henceforth stripped and restuffed by deepsea ILA labor at the pier. As to any container not so stripped and restuffed, the NYSA ocean carrier member aboard whose vessel the container sails is assessed a confiscatory $1,000 per container fine. The clear and intended effect of these rules is to force all local consolidation work to the pier where it can be monopolized by ILA labor. The effect of such a monopoly, however, is that off-pier consolidators, like TEI and CEI, will be forced out of business and their employees, all members of Teamster Locals 707 or 807, will lose their employment.

B. The Litigation Before The District Court

The instant case originally arose out of §8(b)(4) and §8(e) unfair labor practice charges which CEI filed against ILA and NYSA on June 1, 1973, shortly after the said two organizations began to enforce the amended container rules which they adopted in early 1973. Following the filing of those charges, the Acting Regional Director of the Board's 22nd Region, pursuant to §10(1) of the Act (29 U.S.C. §160(1)),

petitioned the U.S. District Court in New Jersey for preliminary injunctive relief. Following several days of hearings and the introduction of voluminous documentary evidence, District Judge Lacey, in a lengthy, detailed and comprehensive decision, issued on September 18, 1973, granted the relief requested and held that the Board had reasonable cause to believe that the "container rules" promulgated by the ILA and the NYSA constituted "unlawful work acquisition" by the ILA and that the enforcement of those rules by NYSA and ILA violated §§8(b)(4) and 8(e) of the Act. Balicer v. ILA and NYSA, 364 F. Supp. 205, 226 (D.C.N.J. 1973). As Judge Lacey was the only judicial authority throughout all of these proceedings to have personally heard, and observed the demeanor of, the several witnesses in this litigation, his decision is uniquely important in all respects but particularly in those portions (364 F. Supp. 217-226) where he painstakingly recites, analyzes, and weighs the individual testimony of each witness as well as the documentary evidence that was introduced.

Following issuance by Judge Lacey of his opinion, ILA/NYSA moved both Judge Lacy and the Court of Appeals for a stay pending appeal. In addition, ILA/NYSA also petitioned the Third Circuit, just as they did this Circuit, for an expedited appeal. The stay was denied, but the expedited appeal was granted. Following submission of detailed and comprehensive briefs by all the parties, the Third Circuit, without opinion, affirmed Judge Lacey's decision. Balicer v. ILA and NYSA, 491 F. 2d 748 (3rd Cir. 1973).

In the meantime, TEI had filed its own unfair labor practice charges directed to the same NYSA/ILA conduct as that involved in the CEI charges and subsequent litigation (33a-45a). And as occurred

following the CEI charges, the Board's 22nd Regional Director once again petitioned the U.S. District Court in New Jersey for §10(l) injunctive relief. And again Judge Lacey, following several days of hearings including new witnesses and new documentary evidence, concluded that the Board had reasonable cause to believe "that the containers of TEI were not systematically stuffed and stripped by ILA labor prior to February, 1973 and that TEI's commercial history of stuffing and stripping containers at its off-pier location constituted a separate work tradition." Accordingly, so Judge Lacey concluded, the "rules" relied upon by the ILA to obtain this work "can reasonably be considered as attempts to unlawfully acquire the work" contrary to §§8(b)(4) and 8(e) of the Act. Balicer v. ILA and NYSA (Twin Express, Inc.), 86 LRRM 2559, 2563 (D.C.N.J. 1974). In addition, and just as he had previously found to be true for CEI in its litigation (364 F. Supp. at 227), Judge Lacey found that if the rules continued to be enforced, TEI "will soon be forced out of business." 86 LRRM at 2564. As the Third Circuit's affirmance had by this time already been handed down in the CEI litigation, ILA/NYSA did not pursue an appeal.

C. The Proceedings Before Administrative Law Judge Ordman

By agreement between the parties, exactly the same evidence as was presented to Judge Lacey in the two District Court proceedings, supplemented only by certain affidavits (61a-128a), constituted the entire record before Judge Ordman. On the basis of that record alone, without any further hearings or submissions of evidence, Judge Ordman concluded that the rules did not violate the Act. While finding, as did Judge Lacey, that with only minor exception the containers of both CEI and TEI regularly "passed over the docks without rehandling [i.e., stripping

and restuffing] by longshoremen" (154a-155a, 156a, 158a), and while also finding that both CEI and TEI had engaged in off-pier consolidating work for many years (152a-158a), Judge Ordman nevertheless concluded that the ILA "did not surrender or abandon" its jurisdiction over local LTL container stripping and stuffing work in the 1959 Agreement (170a, 172a, 179a), and that, as the ILA's activities were directed only to NYSA members "vis-a-vis their own employees" (170a, 184a) and not to the employees of CEI or TEI (169a), its activities were primary and therefore protected under the work preservation doctrine of National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967) (173a, 183a-184a). As for the undisputed fact that the consequences of the ILA/NYSA activities would be to force both CEI and TEI out of business, Judge Ordman passed this off as simply "an inevitable result" of the lawful exercise of primary action which is not thereby converted into action with a proscribed "secondary impact" (173a, 183a).

D. The Board's Decision

Following the filing of briefs and exceptions, the Board, on December 4, 1975, issued its decision which is here under review. In this decision, the Board held that CEI and TEI "have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy" (197a), that with only "few exceptions, ILA has loaded such containers without stripping and restuffing" (200a), and that any on-pier stripping and stuffing work "performed by longshoremen as an incident of loading and unloading ships does

not embrace the work traditionally performed by CEI and TFI at their own off-pier premises" (197a). As the ILA was here seeking to acquire this very work, the facts here were distinguishable from those in National Woodwork (198a). Insofar as the alleged tradition of stripping and restuffing that ILA/NYSA tried -- but failed -- to prove, the Board held that, in any event, "[i]t does not fall within ILA's traditional role to engage in make-work measures by insisting on stripping and [re]stuffing cargo merely because that cargo was originally containerized by nonunit personnel" (198a). Finally, the Board held that whatever claim the ILA might arguably have had to the work was, in any case, abandoned by the ILA in the 1959 Agreement in return for the quid pro quo of royalty payments. Accordingly, so the Board held, the conduct here in dispute did in fact violate §§8(b)(4) and 8(e) of the Act. 1/

1/ Pending the Board's decision herein, and on October 9, 1975, a Federal Maritime Commission Administrative Law Judge, Charles E. Morgan, issued an initial decision, in FMC Dockets 73-17 and 74-40, holding invalid and unlawful under the Shipping Act of 1916 (46 U.S.C. 801 et seq.) the precise same container rules as are involved in the instant case. In the FMC litigation, these rules were incorporated into tariffs filed by the ocean carriers; and the question was whether the tariffs incorporating the rules violated the Shipping Act, specifically §14 Fourth (46 U.S.C. 812), §16 First (46 U.S.C. 815) and/or §18(a) (46 U.S.C. 817). Concluding that the rules violated all three sections, Judge Morgan held inter alia that the rules "unfairly treat and unjustly discriminate against" local off-pier consolidators inasmuch as the carrier "does not provide them the same facilities (containers) as [it] provides other shippers and consignees" (pages 36-37). In other words, so Judge Morgan held, the rules are unreasonable and unlawful because "they deny containers to some shippers while providing containers to other shippers." (page 38). The plain import of this decision is that, under and pursuant to the Shipping Act of 1916, carriers are required to treat all shippers equally. To the extent they supply containers to any shippers (beyond the 50-mile radius of New York) free from application of the rules, they must likewise supply said containers in the same manner to shippers (including, of course, NVOCC/consolidators) within the 50-mile radius. For the full meaning of this decision in terms of the instant case, see n.31 infra.

STATEMENT OF FACTS

A. TEI's Operation

TEI, like CEI, is a Non Vessel Operating Common Carrier (NVOCC), operating under tariffs approved by the Federal Maritime Commission (FMC), and engaged in the business of consolidating, containerizing and shipping cargoes in the trade between the United States and Puerto Rico (187a, 711a). As an NVOCC, TEI receives from shippers less-than-container load (LCL) or less-than-trailer load (LTL) shipments, which TEI then consolidates into containers which, in turn, are shipped to ocean carriers for loading aboard vessels outbound for Puerto Rico. Conversely, in the inbound trade, containers shipped from Puerto Rico to TEI in New York are brought to TEI's off-pier facility, where the containers are opened, and the cargoes inside are separated for delivery to the ultimate consignees (187a, 711-712a).

TEI opened its business in March, 1967, and its off-pier facility in New York is presently located on Charles Street in Manhattan. TEI also maintains similar though smaller off-pier facilities in Jacksonville and Miami, Florida, and Charleston, South Carolina. In addition, of course, TEI maintains a facility in Puerto Rico (711a). All of TEI's work at its New York off-pier facility, including the stripping and stuffing of the containers as well as the trucking of the containers to and from the piers, is done by TEI's own employees, all of whom are represented by the International Brotherhood of Teamsters, Local 707 (188a, 711a-712a).

Throughout TEI's first six years of operations, from March, 1967 to February, 1973, it principally used Sea-Land Service, Inc. (hereafter Sea-Land) and Transamerican Trailer Transport, Inc. (hereafter TTT) as its underlying ocean carriers. While originally it used Sea-Land almost exclusively, since 1970 it has split its traffic on a 60/40 basis between Sea-Land and TTT (189a, 712a). Both of these carriers (as well as Seatrain), pursuant to common carrier tariff provisions which each has on file at the FMC, are obliged to make -- and, in practice, have always made -- containers equally available to all shippers on nondiscriminatory terms, whether the shipper be a manufacturer or an NVOCC.[1a/] A so-called freight-all-kinds (FAK) rate is quoted for all goods shipped in the container, and this rate includes use of the container (1104a-1108a). In order to employ the rate, however, the container must be stuffed by the shipper and stripped by the consignee. In short, the carrier offers the rate so long as neither he nor his employees need have anything to do with the cargo within the container (189a, 1108a).

B. The NYSA, CONASA And The ILA

NYSA is an unincorporated association of employer-members, including ocean carriers as well as stevedoring companies, all of whom are engaged in various functions involving the shipment of cargoes

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1a/ In its Reply Brief (at p. 28) to the Board, NYSA tried to argue that these tariff provisions were all "irrelevant", first, because they "were filed almost 20 years ago" and, second, because they "deal with the amount of freight rates ostensibly for containers consolidated outside of the 50-mile area of the Port of Greater New York." Both of these arguments are plainly wrong, as the provisions are not only still effective and on file at the FMC today, but they plainly pertain to all containers (as they must under the law) on an equal and nondiscriminatory basis. For examples of such tariffs, see the Appendix to CEI's brief herein. For the law requiring that such containers be supplied to all shippers on a non-discriminatory basis, see note 1, supra and n. 31, infra.

between the Port of New York and other ports, foreign as well as domestic, including Puerto Rico. Sea-Land, TTT, as well as Seatrain are all NYSA members (188a-189a). Up until 1971, it was the carriers (including Sea-Land, TTT and Seatrain) that were the voting members of NYSA, and there were approximately 30 non-voting associate members. In mid-1971, however, the carriers "turned the Association over to the stevedoring companies as the voting members" and the carriers then became the non-voting associate members (897a).

The Council of North American Shipping Associates (hereafter CONASA) is an association whose membership is made up of NYSA and other like shipping associations operating along the Atlantic coast from Boston, Massachusetts to Hampton Roads, Virginia. While up until sometime in 1970, NYSA individually conducted its own collective bargaining with the ILA (representing the longshoremen in the Port of New York), CONASA has since been authorized by NYSA and the other like shipping association members to bargain with the ILA (representing the longshoremen from Boston to Hampton Roads) over certain specific subjects including the critical subject for purposes of this proceeding, namely, the subject of containerization (131a, 189a).

Neither TEI nor CEI are members of NYSA nor, of course, are they members of CONASA.

C. The Growth Of Consolidation And Containerization

While there is a good deal of conflicting history over the ILA's historical functions, no one denies that longshore labor historically loaded and off-loaded cargoes on and off of vessels. As technology

improved for loading and off-loading, the amount that an individual longshoreman could load and off-load was no longer limited, as it had once been, to the strength of the particular longshoremen. In addition, to the extent technology improved, more and more small individual packages could be and were inevitably consolidated off-pier and delivered to the pier in consolidated packages as large as the technology for loading and off-loading would permit (72a-75a).

Pier technology finally reached the stage where today 35 and 40 foot containers can be loaded aboard vessels by the use of giant cranes and hoists, stationed on the piers directly adjacent to the vessels. In addition, as technology improved on the pier, it likewise improved for the vessels themselves. By today, vessels are specially built to handle only containers and to do so with maximum flexibility and minimum delay time in port.

No one disputes the fact that as the size of containers that could be loaded and off-loaded increased, the amount of consolidation that could be and was performed off-pier likewise increased -- until today when there is a very substantial off-pier consolidation industry around the Port of New York and when, it is fair to say, the only consolidation work that is done on-pier is that involving cargoes directly generated by ocean carriers for shipment, as it is called, on or for their own accounts. There is no evidence in the record, however, as to how much this particular on-pier consolidation work amounts to nor, indeed, is there anything but, in Judge Ordman's terms (164a, n. 8), "relatively sparse" evidence as to the fact that ILA labor performed this work at all. But it is fair to say, and the Board so found (197a, n. 16), that:

> While the record does not reveal the extent to which longshoremen have engaged in stripping and stuffing containers, it is clear that longshoremen have performed these functions on the piers on behalf of ships since the advent of containerization. 2/

At some point in time, the packing and unpacking of containers became colloquially known as "stripping" and "stuffing". In other words, unpacking the container became known as "stripping" while packing the container became known as "stuffing". With the advent of the ILA/NYSA container rules, these words, as shall be more fully described below, took on additional connotations.

D. The Bargaining History Between The ILA And The NYSA Over The Issue Of Containerization, Heading To The 1959 Agreement

It is at this point that the issues become joined. For ILA/NYSA argue that off-pier consolidation or containerization, though still "embryonic" (ILA Brief, p. 25; NYSA Brief, p. 8) in the 1950's, nevertheless began to become a known and dangerous threat to the ILA and its membership, if not from the moment of its inception than very shortly thereafter. As a result, so the argument goes, the ILA more or less

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2/ For its part, however, NYSA vigorously and repeatedly argues that the record clearly establishes that some "200,000. . .LTL and consolidated boxes" move through the Port each year "into which 2,500 ILA employees consolidate the various breakbulk deliveries at the piers" (NYSA Brief, pp. 10, 33, 46, n. 27, and 50). ILA argues that approximately 3,000 of its members are involved in this work (ILA Brief, p. 46). But the ILA cites no authority for its numbers; and as for NYSA, the witness whose testimony is exclusively relied on for these figures, Captain Haynes, not only had never once seen any stripping performed (1052a) but his very testimony setting out the figures was based on his assumption -- later proven to be wholly erroneous -- that ILA labor was regularly stripping and restuffing the local consolidated containers (1023a). Were these latter containers excluded, we might then get a fair count of how much stripping and stuffing was being performed by ILA labor. But no such count appears anywhere in this record, thus prompting Judge Ordman's and the Board's observations quoted above. The real importance of this evidentiary lacuna, however, is that it puts into very serious doubt all the ILA/NYSA assertions that chaos and widespread unemployment will ensue on the piers if their joint position is not sustained by this Court.

persistently pressed the importance of this threat on the NYSA in negotiations preceding 1959; and in 1959, the ILA finally succeeded in obtaining certain provisions in its collective bargaining agreement with the NYSA that both preserved its claim to, as well as its jurisdiction over, all off-pier LTL consolidation work performed within the Port of Greater New York (ILA Brief, pp. 8-9; NYSA Brief, pp. 15-18, 45-46).

In their view of this now-famous 1959 Agreement, the ILA obtained the right to strip and restuff all LTL containers which were packed by off-pier consolidators located within the Port of Greater New York or, more colloquially, within a 50-mile radius of the New York Port. This means, of course, that even though the container had already been fully packed (i.e., stuffed) by the off-pier consolidator, the ILA, so ILA/NYSA now argue, obtained the clear right in the 1959 Agreement to completely unpack (i.e., strip) and then repack (i.e., restuff) that container. ILA/NYSA further argue that, under the plain terms of the 1959 Agreement, the ILA surrendered only the right to strip and restuff containers with household goods or U.S. mail and, in addition, shippers' load containers (i.e., those containers holding cargo which was packed by a manufacturer with his own goods for dispatch to one beneficially owning consignee). But it expressly preserved the right to strip and restuff all other containers, specifically those of all off-pier consolidators within a 50-mile radius of New York.

The pertinent terms of the Agreement, which was executed between the ILA and the NYSA in 1959, and from which the ILA purportedly obtained all these detailed concessions which so expressly preserved all

of its jurisdictional claims over off-pier consolidated containers, provided as follows (144a-145a, 190a, 208a-209a):

> "[Section] 8 -- Containers: Dravo Size or Larger
>
> a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
>
> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

ILA/NYSA both argue that, on the basis of the fairly simple terms of this Agreement, the ILA obtained all the concessions and all the detailed work and jurisdictional protections described above. While generously conceding that the terms of the Agreement "may not have been entirely precise", the ILA argues that "there existed stuffing and stripping regulations in practice at the docks from 1959" (emphasis in original) (ILA Brief, p. 8). Moreover, so ILA argues, all of the ILA and NYSA witnesses testified "that the ILA always insisted, and in practice had the right, to load and unload [sic] the cargo of all containers other than shippers' loads" (Id.).

For its part, and though no one disputes that the NYSA for many years "pressed for the free use of containers without restriction or limitation by ILA" (144a), the NYSA now wholly and fully shares each and every one of the ILA's interpretations of this 1959 Agreement. Indeed, judging from those portions of NYSA's Brief which are directed

to the 1959 Agreement (see e.g, pp. 15-18, 45-48), it is quite clear that NYSA treats these interpretations as at least as holy, if not even holier, than does the ILA. Why NYSA, which so often did battle with the ILA for so many years and through so many strikes, with so much of the conflict directed to this very issue of containerization, should now so suddenly share with the ILA such an identical interpretation on this indisputably critical issue is a question which can only be answered, if at all, by assessing the effects of the 1971 change in the NYSA's membership status, where the stevedoring interests clearly gained control at the expense of the ocean carriers.[3/]

Finally, and for its part, TEI's views as to the meaning of the 1959 Agreement will be discussed in greater detail at a later point. Suffice it to say at the moment, however, that TEI fully shares the views of the Board and believes that there can only be one plain meaning for the concise provision of Section 8(a) that "[a]ny employer shall have the right to use any and all type of containers without restriction or stripping by the union".

3/ In its brief to the Board (at pp. 55-57), NYSA suggested that its sudden honeymoon with the ILA was really due to the fact that, only if the NYSA and the ILA are able to obtain the off-pier consolidation work here in issue will the NYSA be able to satisfy its contractual indebtedness for guaranteed annual income (GAI) payments to the ILA and its membership. If this is true, it suggests only that the GAI had best be reexamined very soon and certainly before the carriers are forced either into bankruptcy or, in the case of U.S. flag carriers, seeking higher subsidy from the U.S. Government. It is interesting to note in this respect that, according to recent estimates, the subsidy cost to the U.S. Government per shipboard worker has now risen to approximately $14,000 a year. See 7 Jour. Mar. L. & Comm. 443-444 (January, 1976). This might be compared to the $16,500 that each of 3,300 ILA members were apparently collecting in 1972, presumably for doing no work at all (1023a). It is hard to say, moreover, whether the situation has since been improved. See Journal of Commerce, Dec. 29, 1975, p. 1 "Port of N.Y. Cargo Fee To Be Raised."

E. The ILA/NYSA Vis-a-Vis Off-Pier Consolidators During The Period From 1959 to February, 1973

1. The Changing ILA/NYSA Argument Over Stripping and Restuffing

This Court should be aware that, until submission of their reply briefs to Judge Ordman, both the ILA and the NYSA had staunchly and unflinchingly contended that, from and after the 1959 Agreement, ILA labor had consistently, or at least regularly (or at worst occasionally) stripped and restuffed the containers shipped to the piers by all off-pier consolidators, such as CEI and TEI, located within the 50-mile circle around the New York Port. As no one has ever disputed the fact that ILA labor never once packed (i.e., stuffed) or unpacked (i.e., stripped) even one container for either TEI or CEI, the only manner by which ILA/NYSA could establish anything even approaching a history or tradition of working TEI or CEI containers, or indeed the containers of any other off-pier consolidators, was by showing a history or tradition of stripping and restuffing -- in short, a history or tradition of plain and unadulterated make-work.

Unenviable though this task might be to some, ILA/NYSA undertook it with a joint fervor, and countless pages of testimony were consumed by ILA/NYSA witnesses testifying and otherwise trying to prove that ILA labor had in fact established a long and consistent tradition of make-work. But when all was said and done, and as we shall show directly below (infra, pp. 17-19), amidst voluminous evidence of phony documents, phony seals, and alleged deceptive practices, there was absolutely no persuasive evidence on the record that ILA labor had ever stripped

and restuffed even one TEI container. Moreover, as Judge Ordman himself noted (155a, n. 4), by the time of their Reply Briefs to him, both the ILA and the NYSA had virtually conceded that almost no stripping and restuffing by ILA labor ever took place except for one or two wholly isolated incidents. TEI's history, as next discussed, amply demonstrates why the ILA/NYSA had no alternative but to jettison their argument as to a make-work tradition.

2. Did The ILA Ever Strip And Restuff Any TEI Containers?

As previously indicated, TEI opened its business in March, 1967. From then until "sometime in 1968", there is no evidence in the record suggesting that the ILA ever stripped and restuffed even one of TEI's containers that passed over the piers (718a). Sometime in 1968, however, and in the words of TEI's founder and President, Nester Sanjurjo (711a, 718a):

> ...while in San Juan, I received a call from Roland Rolejo, our traffic manager in New York. He told me that Sea-Land was holding our containers and threatening to have them stripped. I became very alarmed since this had never happened before and flew immediately to New York to see what I could do. When I arrived, Mr. Rolejo had several conversations with Sea-Land officials and related the content of those conversations back to me. I was unable to participate in those conversations since I do not speak English. However, after about a week, Mr. Rolejo informed me that Sea-Land agreed not to detain our containers any longer (emphasis added).

Mr. Sanjurjo concluded this portion of his testimony by frankly admitting that "whether or not any of those containers were stripped, I do not recall, but if any were, they did not amount to more than a few" (718a). This then is the sum total of the evidence relating to the

first occasion when TEI's containers were allegedly stripped.

As for the second occasion, again the uncontradicted statement of Nester Sanjurjo best describes what occurred (718a):

> We had no further problem with Sea-Land until late 1971 around the time of the ILA negotiations. I was informed by my son, Ernesto, that Sea-Land had started to strip our containers. We discussed the problem and decided to switch all of our business to TTT, where no stripping was taking place. When we did switch our business from Sea-Land to TTT, Sea-Land told us that they would do their best to solve the problem. A month or two later, Sea-Land called us back, told us that the stripping problem had been solved, and asked us for our business again. We went back to Sea-Land while maintaining some of our business with TTT and continued that way without stripping at either steamship line until February, 1973.

Whether or not this incident establishes that stripping did take place before TEI switched its business to TTT is an open question. But there is no question over the fact that the aforementioned two incidents provide the only evidence throughout the entire record as to whether ILA labor ever stripped and restuffed any of TEI's containers. And there is likewise no question over the fact that, between 1970 and 1973, and except for the 1971 incident, well over 3,300 TEI containers passed over the piers without one of them ever being stripped and restuffed by anyone (718a-719a, 721a).

We shall leave to CEI, in its own brief, the task of demonstrating just how equally seldom any of their thousands of containers were ever stripped and restuffed prior to 1973. Suffice it to say at this point, however, that while NYSA still valiantly attempts to read the foregoing facts as demonstrating that ILA stripping and restuffing of TEI and CEI containers occurred "at times for periods of several months" (NYSA Brief, p. 22), neither NYSA nor ILA any longer try to argue that the

isolated forays against TEI and CEI containers can in any way be treated as even suggesting, let alone establishing, a history or tradition of stripping and restuffing. In any event, and as the Board so expressly found (198a), "[i]t does not fall within ILA's traditional role to engage in make-work measures". Nor could -- or should -- the ILA ever be permitted to establish a history or tradition based upon such "make-work measures" even if they had arguendo occurred.

3. The Impact Of This Evidence On The NYSA/ILA Case And The Emergence Of Their Alternative Approach

Once appreciating the full impact of the foregoing evidence, not to mention the serious disadvantages of attempting to rely on blatant make-work measures as the only means through which to establish a tradition, ILA/NYSA knew that they had no alternative but to abandon the entire theory and approach by which they had originally defended this case throughout both hearings before Judge Lacey. And for all practical purposes, they did so. But their alternative approach, which still appears to be emerging, is by no means a model of clarity. Indeed, their new approach might best be described as being predicated not on "what actually was" but on "what allegedly should have been".

Thus, they argue that it is sufficient if TEI and CEI simply knew or were aware of the make-work requirement prior to the 1968 Agreement because, so the argument appears to go, mere knowledge on the part of the consolidators that there was such a requirement -- whether or not enforced -- is alone adequate to establish the ILA's history and tradition. And to establish such knowledge, ILA points to a host of concededly phony documents and seal changes all of which, they argue,

resulted from both the "deliberately evasive and misleading tactics of the shippers" (ILA Brief, p. 12) and "nefarious practices among the disingenuous carriers" (ILA Brief, p. 13). In short, that the consolidators and carriers allegedly engaged in such misconduct, so ILA now argues, provides the proof of their knowledge of the requirements.[4/]

In addition, NYSA/ILA also rely heavily on the fact that all of their witnesses allegedly testified that the ILA at all times always had the right to so make-work, whether or not they exercised that right. But that all of these arguments boil down simply to relying on "what allegedly should have been" rather than on "what actually was" is readily apparent. And the only additional factor relied on by NYSA/ILA to support their position is their contention that, no matter how "sparse" the record evidence might have been as to ILA labor engaging in actual (i.e., of the non-make-work type) stripping and stuffing work on the pier, such work was in fact done to some extent -- as the Board so expressly found (see supra p. 12); and adding this factor[5/] to the factor of "what allegedly should have been" ought to be enough, in the ILA/NYSA view, to sustain their position.

We shall, of course, answer all of these arguments in detail below. But it would appear that the foregoing represents the sum and substance of the present NYSA/ILA position before this Court.

4/ In the proceedings below, both NYSA and ILA also vigorously contended that Nester Sanjurjo knew of the Rules when he first started in business. But as TEI started business in March, 1967, and as Sanjurjo only learned about the Rules "for the first time at the end of the year 1968" (1164a), this contention could find no support in the record; and it has not been raised on this appeal.

5/ It is doubtless for this very reason that NYSA so repeatedly emphasizes, however inaccurately (see supra p.12,n.2), the alleged 2,500 ILA members allegedly stripping and stuffing 200,000 containers annually. For other than the "what allegedly should have been" factor, the foregoing figures provide the only theory upon which the NYSA/ILA can now base their case.

F. The 1968 NYSA/ILA Agreement

Accompanied by a strike, the appointment of a Presidential Board of Inquiry, and the invocation of the 80-day injunction provision of the Taft Hartley Act, the 1968 NYSA/ILA Agreement was finally concluded in early 1969. The problem of containerization, as was to be expected, was one of the principal issues in dispute. And the provision that was adopted in the 1968 Agreement to resolve this dispute sets out virtually all the detailed rules which NYSA/ILA now contend were really adopted in the 1959 Agreement -- as their respective witnesses look back upon the interpretation of that Agreement today. In any event, whether totally new or totally adopted from the 1959 Agreement, the 1968 Rule provided as follows (247a-250a):

RULE 1: DEFINITIONS AND RULE AS TO CONTAINERS COVERED.

Stuffing - means the act of placing cargo into a container.
Stripping - means the act of removing cargo from a container.
Loading - means the act of placing containers aboard a vessel.
Discharging - means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

(a) Containers owned or leased by employer members (including containers on wheels) which contain LTL loads or consolidated full container loads.

(b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

RULE 2: RULE OF STRIPPING AND STUFFING APPLIES TO SUCH CONTAINERS.

> A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personnel effects of military personnel shall be exempt from the rule of stripping and stuffing.

RULE 3: RULES ON NO AVOIDANCE OR EVASION.

* * * * * * * * * * * * * *

> (e) Failure to stuff or strip a container as required under those rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

There is no dispute over the fact that this rule clearly provided for all the forms of protection that both ILA and NYSA now contend were previously provided for in the 1959 Agreement. Specifically it spelled out the ILA's right to strip and restuff all containers, except shippers' loads, consolidated by off-pier consolidators located within a 50-mile radius from the Port of New York -- in violation of which the carrier would be penalized $250 per container, with the carrier's failure to pay punishable by strike action against that carrier by the ILA.

The words "stripping and stuffing", of course, had to mean "stripping and restuffing" though presumably, for public relations reasons, the former formulation was used. To avoid a situation, however, where the word "stuffing" could also be taken to mean re-restuffing, the ILA did concede, in Rule 2, that it would not strip or stuff a container "more than once". But just as there is no dispute over the fact that this Agreement clearly sets out the protections that ILA/NYSA contend were adopted in the 1959 Agreement, there is likewise no dispute over the fact that the containers of TEI and CEI continued to pass over the piers, without any ILA restuffing and without any payment of penalties, just as regularly and consistently after this Agreement as they had before this Agreement. In short, TEI simply brought its thousands of containers to the piers from 1969 up to 1973 and, as was the case from 1967 through 1969, they were all loaded on board vessels without ever being stripped and restuffed.

One additional clause of this Agreement deserves specific mention. In apparently attempting to close all loopholes, ILA also obtained paragraph 3(f) which provides as follows (250a):

> (f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

As probably every New York off-pier consolidator in the Puerto Rico trade had at least on one occasion used Sea-Land, and as Sea-Land can only carry its own containers (719a), the object (and effect) of this rule was quite obviously to extend the stripping and restuffing requirement beyond just containers "owned or leased" by NYSA members

and to encompass also all foreign containers (i.e., containers obtained by consolidators not from NYSA members, but from, for example, railroads or container rental companies). The significance of this clause cannot be underestimated because as the Board so properly observed (198a-199a):

> . . .there is compelling evidence that the agreements between ILA and NYSA were not in reality solely concerned with the preservation of the work to which ILA claims it was entitled. ILA and NYSA have steadfastly asserted that their agreements, and the maintenance thereof, were calculated to prohibit NYSA employer-members from furnishing containers to consolidators, thus preserving for the longshoremen work which they would perform were the containers not provided by their employers to consolidators. However, the record reveals that, even if Consolidated and Twin obtained trailers or containers not owned or leased by NYSA employer-members, those "foreign" containers would still be considered as falling within the provisions of the Rules on Containers and the Dublin Supplement, and the stuffing and stripping of such containers would likewise be claimed by ILA.

What is even more important is that, by stretching out to reach all containers -- foreign and otherwise, the ILA demonstrated, however unwittingly, that its objectives here were absolutely identical to the ILWU's objectives on the West Coast.[6/] See ILWU (Cal. Cartage Co., Inc.) 208 NLRB 994 (1974), enforced without opinion, sub nom., Pacific Maritime Association v. NLRB, 515 F. 2d 1018 (D.C. Cir. 1975).

6/ To be sure, NYSA and ILA now try to argue that there were no such foreign containers involved in this case because the "foreign containers herein were in fact leased by the ocean carrier, i.e., TTT" (NYSA Brief, p. 41, n. 22; ILA Brief, p. 24, fn.). Indeed, NYSA categorically asserts that "[a]ll containers used by [TEI and CEI] were supplied by NYSA ocean carriers" (NYSA Brief, p. 23, n. 13). NYSA even goes so far as to argue that, had the foreign containers here involved been leased or rented from other than NYSA carriers, such containers would not have been subject to the restuffing requirement. But all of this utterly ignores the uncontradicted statement of Nester Sanjurjo that, when the steamship companies ceased supplying him with containers in 1973, he spent $25,000 renting containers from a "rental company" (720a-721a), and this obviously was not TTT. In short, ILA/NYSA are totally wrong in trying now to argue that the instant foreign containers were in fact rented from TTT. Moreover, contrary to NYSA's new interpretation of the rules, when TEI sent these foreign rented containers to TTT in 1973, they too were subjected to the stripping and restuffing requirement (719a). Accordingly, NYSA's reliance on In Re New York Shipping Assn., 54 LRRM 2680 (Sup. Ct. N.Y.C., 1963) to now, for the first time, establish a totally new and purportedly liberalized interpretation of the 1959 or 1968 rules is wholly without basis. See n. 14, infra and accompanying text.

G. The 1973 ILA/CONASA Dublin Supplement And Its Impact

1. The 1973 Dublin Supplement

Notwithstanding adoption of the 1968 Agreement, and as previously indicated, all of TEI's containers continued to pass over the pier without stripping or restuffing by the ILA -- except, of course, for whatever the ILA alleges might have been done in its isolated foray during 1971. In 1970, NYSA and ILA agreed to increase the "liquidated damage" penalties from $250 to $1,000 per container violation (149a, 193a, 258a-260a). But as everyone now concedes, this change likewise proved ineffective, and thousands of LTL off-pier-consolidated containers continued to pass over the piers without ILA restuffing.

Sometime later, however, CONASA entered the picture and, on January 29, 1973, the now-famous Dublin Supplement was agreed upon between CONASA and the ILA (150a, 193a). This agreement was the culmination of a meeting which was held between members of the two groups in Dublin, Ireland. There is no evidence that there was any serious conflict of any nature over adopting the Supplement (see, e.g., 274a-283a). Certainly, there was not the usual accompanying litany of contract offer rejections, strike votes and strikes, which had once so traditionally marked the negotiating relations between the ILA and their steamship carrier employers. In short, a new era of cooperation had been reached -- which is certainly laudable, except that it seems to have had as its principal object the elimination of all off-pier consolidators, like TEI and CEI, and the monopolization by the ILA of all the work which those consolidators had previously done.

The purpose of the Dublin Supplement was to enforce the container rules in the 1968 Agreement (150a-151a, 193a-194a), and that purpose was clearly accomplished. Enforcement of the Supplement began almost immediately after its adoption. By early February, 1973, TEI had been informed by both Sea-Land and TTT that henceforth both would now have to enforce the rules and start stripping (719a). In mid-March, Sea-Land simply ceased supplying TEI with containers and, as Sea-Land can carry only its own containers, this meant that Sea-Land had effectively ceased doing business with TEI (719a). TTT likewise ceased supplying TEI with its containers, though TTT will carry foreign containers obtained by TEI from railroads or container rental companies. Even these containers, however, are first subjected to stripping and re-stuffing by the ILA (Id.). It is thus clear that the Rules are not only all-encompassing, including also foreign containers[7/] but they are being rigorously enforced to the substantial detriment not only of TEI, but also the shipping and consuming public.

2. The Impact Of Dublin On TEI

Rather than detailing all the adverse effects suffered on TEI as a consequence of Dublin, it is perhaps more appropriate simply to quote from Judge Lacey's opinion (Balicer, supra, 86 LRRM at 2563-64) granting the §10(1) injunctive relief restraining NYSA and the ILA from applying the stripping and restuffing rules against the containers of TEI.

7/ See n. 6 supra

In so quoting from Judge Lacey's opinion, however, we wish to mention that, in reaching his findings in this regard, Judge Lacey was not merely finding "reasonable cause" to believe that the Board's case on this point was "substantial and not frivolous". To the contrary, he was making, as was his obligation, independent fact findings of his own, based upon the testimony and the credibility of the witnesses, as a condition precedent to determining whether injunctive relief was appropriate. As such, his findings on this score are and should be treated as indisputable. These findings were as follows:

> It is clear that TEI has sustained serious losses as a result of the enforcement of the Rules on Containers. The post-February, 1973 stripping and stuffing and refusal to provide containers has hurt TEI in that it can no longer promise door-to-door delivery within a specified period of time. Their customers are no longer free from loss or damages to the freight because of the exposure created by the stripping and restuffing.
>
> Moreover, customers are not paying their bills. TEI has had to hire two full-time salesmen for the first time who not only do sales work but handle complaints and claims. Because TEI must now lease trailers which were formerly supplied by the steamship companies, it has paid about $25,000 in trailer rentals since February, 1973. Additionally, TEI's credit standing has been affected. It has had trouble getting credit from the underlying carriers. TEI's cash flow has been affected, putting it in a severe financial condition which requires it to borrow more money, which in turn requires that it pay more interest on the loans. TEI's ability to get key employees has been adversely affected by the imposition of the Rules. Several competent people turned down jobs with the TEI because they did not think there was enough security in their business at the present time. The steady pattern of growth which TEI enjoyed since 1967 has been reversed because of the imposition of the Rules on Containers. In 1973, TEI was 162 containers behind the number of containers shipped in 1972, rather than being 200 ahead as had been the pattern in the previous years.
>
> One direct result of the lack of growth in 1973 was TEI's cancellation of a lease at a terminal it was about to rent in Maspeth, New York, which would have provided

> greatly expanded facilities and an opportunity to substantially enlarge their business; and I credit Mr. Nestor Sanjurjo's testimony that if present conditions continue TEI will soon be forced out of business. Thus I find that TEI is suffering and will continue to suffer irreparable injury and that injunctive relief in this case would be just and proper.

Nor do NYSA/ILA seriously dispute that, to the extent their efforts here are successful, the inevitable and immediate consequence will be to force TEI out of business.[8/]

3. The Impact Of Dublin On the Public

Should the Dublin Supplement not be invalidated, the harm that will certainly be inflicted on the American public will also be inestimable. Shippers who previously were able to depend on fast and efficient methods to get their goods to their ultimate consignees will now once again face the known hazards and delays that necessarily accompany break bulk handling on the piers. Given the elimination of consolidators and the specialized as well as personalized nature of their work, the public will not again see same day sailings and will most assuredly lose the advantages and efficiencies of the sequential system of loading and unloading which assures the most rapid

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8/ In almost identical language, however, ILA/NYSA both suggest that even though a consolidator will no longer be able to consolidate, it will still be free to continue "to perform its normal tasks of soliciting, pulling together and forwarding small shipments from various shippers under a single bill of lading" (NYSA Brief, p. 42, n. 23; ILA Brief, p. 20). Such a suggestion, we believe, demonstrates a purposeful lack of understanding of the consolidation industry. For all of these other tasks are, and by their very nature must be, incidental to the chief task of consolidation. In short, depriving TEI of the consolidation work is tantamount to forcing it out of business entirely.

delivery at destination. Overages will become common, and shipments to one consignee, instead of all being consolidated in one container, may well be divided between two containers without any assurance when either will arrive at destination, let alone that both will arrive simultaneously. Given these conditions, increased damage and delay claims are inevitable -- as also are increased freight rates. In sum, elimination of the healthy and robust competition that off-pier consolidation today represents in the world of ocean carriage would constitute a major setback for both maritime transportation and the public that it serves.

There simply is no alternative, therefore, but to invalidate the rules and, as we shall show below, their invalidation would be perfectly consistent with, and indeed, is required by the law as it exists today.

SUMMARY OF ISSUES AND ARGUMENT

A. The Issues And The Positions Of The Respective Parties

The principal legal issue presented by this litigation is whether the ILA's conduct, in entering into and enforcing the Dublin Supplement and the Container Rules of the 1968 Agreement, constituted unlawful activity proscribed by Sections 8(b)(4)(ii)(B) and 8(e) of the Act. If so, of course, such activity would constitute a violation by NYSA also of §8(e) of the Act.

Subsumed under this issue are a myriad of other issues, foremost among them being: whether, given the surrounding circumstances of this case, the ILA's activities can fairly be said to have as their object the acquisition of work traditionally handled by employees elsewhere or whether their true object was merely that of preserving their own

work through lawful primary activity against their employer, the NYSA. If the former, then NYSA is the neutral employer, and the ILA's activities are accordingly proscribed by §8(b)(4). If the latter, then NYSA is the primary employer and, presumably, the ILA's conduct is protected by the Act. We say "presumably" because here too still another critical issue emerges, namely, whether even if the instant case can be a work preservation situation within the purported purview of National Woodwork, supra, does this ipso facto mean that the inevitable and recognized secondary effects of the ILA's conduct on employers like TEI and CEI must necessarily be ignored, no matter how admittedly adverse those effects may be?

It is TEI's view, of course, that given all the surrounding circumstances of this case, no other conclusion is possible but that the ILA's activities here, in the words of National Woodwork (386 U.S. at 644), were "tactically calculated to satisfy union objectives elsewhere". For as we shall show, the ILA objective was none other than to eliminate all off-pier consolidation within a 50-mile circle of the New York Port so that the work formerly performed by employees of off-pier consolidators would thenceforth be performed only by on-pier ILA labor. It is further TEI's view that even if some work preservation claim is arguendo valid on the part of the ILA in this instance, the effects of the assertion of that claim upon off-pier consolidators, like TEI and CEI, are so substantial and adverse that, on balance, the ILA's activities here are not ipso facto protected within the purview of National Woodwork but must be deemed secondary and unlawful within the purview of that decision. Indeed, TEI firmly believes that here, to borrow the precise words of Justice Brennan in his decision

in National Woodwork, 386 U.S. at 630, the boycott "was carried on . . . as a sword to reach out and monopolize all the [off-pier consolidation] job tasks for [ILA] members."

Even before reaching these difficult issues, however, there is the preliminary, but highly significant, question of whether the ILA, in the 1959 Agreement, or through its course of conduct from that Agreement through 1972, surrendered or abandoned any claim that it may arguendo have had to the work here in issue. For if they in fact surrendered or abandoned such claim, then none of the other issues need even be examined, as it would then be clear that their object was that of recapturing work previously surrendered or abandoned; and no one disputes that such an object is not protected even within the broadest application of the so-called work preservation doctrine. Like the Board, TEI believes that the ILA did in fact surrender or abandon the work here in dispute not only under the express terms of the 1959 Agreement but by their consistent course of conduct following that Agreement and up to February, 1973. NYSA/ILA naturally take the contrary position.

We shall examine each of these issues below in detail. Before doing so, however, we believe that one critically important factor requires clarification.

B. The Impact Of Containerization Upon Longshore Work

1. The Statistical Evidence

Throughout their briefs (see, e.g., ILA Brief, pp. 8, 15, 18-19, 23, 43-47; NYSA Brief, pp. 5-6, 8-9, 12-13, 40), both NYSA and ILA persistently argue that the container revolution was responsible for a massive diminution in ILA work opportunities and that off-pier

consolidators, like TEI and CEI, were not only factors in that revolution but may indeed have been the principal factors responsible for the diminution in work. These arguments, we believe, are questionable on all scores.

Initially, both NYSA and ILA argue that, "embryonic" though containerization may have been in 1958 and perhaps all the way up through 1967 (ILA Brief, p. 25; NYSA Brief, p. 7), it was still a sufficiently significant threat to ILA job opportunities as to move the ILA to insist on all the protections which it allegedly obtained in the 1959 Agreement. To corroborate their argument as to the significance of this threat to ILA jobs, NYSA/ILA rely on the now-famous Exhibit R-12 (285a) which in fact does show a very substantial diminution in "total employees" from 1954 to 1959. But on careful examination, this Exhibit discloses that there was no diminution -- indeed in some years there were increases -- in "total hours worked" by ILA labor during this same five-year period over the previous four years. Moreover, we have prepared an additional exhibit, attached to this brief as an Appendix, which does nothing more than add two columns to Exhibit R-12 (285a). But these two columns disclose two very significant facts: (1) the only reason why there was a substantial diminution in the number of employees between 1954 and 1959 is that, as Column 6 demonstrates, each employee was working almost 50% more hours from 1955 through 1959 than he was from 1951 through 1954; and (2) if the employees from 1955 onward had worked the same average number of hours as were worked by each employee from 1951 through 1954, Column 7 plainly demonstrates that the total number of employees would have been higher in every single year from 1955 through 1968 over the period 1951 through 1954.

And one of the banner years during this entire 13-year period was that very year, 1959, when the ILA was allegedly working so assiduously in the negotiations to preserve its members' work.[9/]

The long and short of this is that, try though they might, ILA/NYSA should not be permitted to have it both ways. They speak so eloquently of massive job opportunity reductions but cannot show any persuasive statistics to support those reductions until, at the earliest, 1969 (and that was the year which included the 57-day strike). More importantly, if off-pier consolidation had indeed been so significant a threat as to warrant the ILA/NYSA 1959 Agreement as presently interpreted by the ILA/NYSA, then it simply cannot be argued that off-pier consolidators were the reason for the reduction in jobs that occurred more than a decade later. On the other hand, if the reduction after 1969 was in fact due principally to off-pier consolidators, then it is quite clear that: job opportunity reduction became a threat only in 1968; that off-pier consolidation was not banned by the 1959 Agreement; and that, by 1968, off-pier consolidation was already an industry with an established work history and tradition.

2. The Overall Picture

Finally, we should like to make a few observations concerning the overall picture of containerization. Nothing can be more certain than

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9/ Significantly, in 1960 NYSA likewise argued that the number of ILA jobs as well as the number of longshore hours worked had shown no diminution over the previous five-year period -- which period, of course, included the famous year of 1959. See Stein Award (at 357a-358a). Naturally, NYSA does not take the same position today as it took then, when it was still effectively controlled by carrier, not stevedoring interests. Nevertheless, the figures in the Appendix demonstrate just how absolutely accurate NYSA was in its 1960 position.

that containerization revitalized the transport of goods by ocean-going vessels. If it had not been for containerization, it is demonstrably certain that such transport would have diminished substantially overall, or would have been diverted in increasing amounts to aircraft (particularly the higher rated cargoes yielding the highest revenues) or, at the very least, would simply have not expanded to the extent it has since containerization. Given any of these alternatives, however the jobs of longshoremen loading individual small pieces aboard vessels, as was the practice of yore, would have in any event declined and most probably by very substantial proportions. It is certainly arguable, therefore, that, by giving ocean transport by vessel the shot in the arm which it did, containerization saved, or perhaps even expanded, employment opportunities for the longshoremen from what would have been the case if the container revolution had never materialized.

Beyond this, as a small off-pier consolidator, we find it most unfair to be accused, directly or otherwise, of being a principal factor in the alleged reduction of longshore job opportunities that purportedly followed from the container revolution. For if that alleged reduction resulted principally from, for example, improved technological methods for getting cargoes on and off vessels, or, for example, the construction of new types of vessels reducing the number of longshoremen needed to work in holds stowing and extracting cargoes, or, as still another example, because of the advent of computers which may have replaced longshore checkers or clerks, then it can hardly be concluded that the responsibility for any reductions that may have occurred must be laid at the doorstep of off-pier consolidators like TEI and CEI.

Lastly, given the statistics showing reductions in recent years (see Appendix attached to this brief), we cannot imagine why these were not contemplated and fully provided for -- not just as a result of the GAI (which began during 1964-65 and which totalled some $100 million by 1972) but, even more so, by the royalty payments agreed to in, and presumably regularly paid since, the 1959 Agreement as supplemented by the Stein award. See infra pp. 40-43. We are not at all unmindful of the serious unemployment problems often caused by technological progress, and we very strongly support interim measures allowing for reasonable adjustment or retraining periods. But where such a period, as is the fact in this industry, began as early as 1959 -- almost 17 years ago -- we are forced to question just how much longer the shipping public should be asked not just to continue paying old debts but, as here, to incur still new debts by way of now providing the ILA with a monopoly on all local stripping and stuffing work.

* * * * * * *

This said, we shall now proceed to show below, first, that not only is there a history and tradition of off-pier consolidation but that, in the 1959 Agreement and/or by its consistent course of conduct and activities thereafter through 1972, the ILA in fact surrendered or abandoned any claim it may arguendo have had to the work here in dispute. We shall then show that, in any event, all the facts and circumstances in this case militate towards the conclusion that the ILA's object here was clearly secondary and otherwise unlawful and, as a consequence, its conduct with the NYSA, in adopting and enforcing the so-called container rules, violated §8(b)(4)(ii)(B) and §8(e) of the Act.

ARGUMENT

A. The ILA Does Not Have A Claim To The Work Here In Dispute Either On A Contractual Basis Or On The Basis Of Its Having Traditionally Or Historically Performed The Work

1. The Record Plainly Establishes The History And Tradition Of Off-Pier Consolidation By Non-ILA Labor

Simply by contending that it was attempting to eliminate off-pier consolidating as early as 1958, the ILA concedes that, at least by that time, off-pier consolidating was an established business. But it was an established business long before then, as the record in this case readily establishes. Thus, whether or not CEI is treated as the successor to Valencia-Baxt, the very existence of Valencia-Baxt proves that off-pier consolidating was a commonly accepted practice by 1949 if not long before (794a, 65a-66a). As early as 1951, the then Federal Maritime Board spoke of the function of the off-pier consolidator at whose warehouse "shipments are loaded into special containers furnished by the ocean carrier and thereafter delivery is made to the pier of the ocean carrier." Bernhard Ulman Co. Inc. v. Puerto Rico Express Company (1182a, 1185a, 1190a at n. 1). Between then and 1958, the record establishes -- and both parties would so concede -- that larger containers began to be used and off-pier consolidation became more and more popular, as shippers readily sought the advantages implicit in having their shipments arrive at the piers not loose in break bulk packages, but consolidated in sealed containers.

If anything can be said with certainty on the basis of the instant record, therefore, it is that from the very beginning of containerization, there has been a history and tradition of off-pier consolidation

by companies employing non-ILA labor. Indeed, it is just because of the growth of these companies -- however "embryonic it might be characterized today for briefing purposes (see p. 32, supra) -- that the ILA/NYSA can now contend that, as early as the 1959 Agreement, they were taking definite steps to bring the growth to a definite end. But it is at this point that the dispute begins in earnest. For it is our contention, as more fully detailed below, that the 1959 Agreement not only never had such an object but, indeed, had a directly contrary object, namely, to abandon any right that the ILA may arguendo have had to such work in return for what the ILA anticipated would be regular and substantial royalty payments.

2. The NLRB Was Clearly Correct In Concluding That, In The 1959 Agreement, The ILA Not Only Did Not Preserve A Claim To The Work Here In Dispute, But It Expressly Abandoned Or Surrendered Any Such Claim That It May Have had To Said Work

The 1959 Agreement is not only plain in its meaning, but it is logical in its objective. In §8(a), the ILA and the NYSA agreed that "any" employer -- not just NYSA members and not just employers with shippers' load -- could use "any and all" containers, and such containers would be subject to no "restriction or stripping by the union". Since both parties expressly agreed that there was to be no stripping, it was entirely superfluous for them to say anything about stuffing, and that term was accordingly not used. Nothing, we submit, could be more plain and simple than this meaning.[10/]

10/ Important though the 1959 Agreement is to this case, it is noteworthy that its text is nowhere set out in either of petitioner's briefs. Be that as it may, both NYSA and ILA argue that §8(a) did not really mean "any and all containers" but only "shippers' loads" containers. They further argue that "any employer" meant only "NYSA members" (NYSA Brief, pp. 15-16; ILA Brief, pp. 9-10). Obviously recognizing that the language of §8(a) is not conducive to such interpretations, both petitioners argue that the language should be ignored because, in sum and substance, the only thing of importance under a contract of this type is not what the language says or even what actually occurred but what the parties allegedly thought was occurring, i.e., "what allegedly should have been". (ILA Brief, p. 8; NYSA Brief, pp. 17, 46-48). But as for this argument, see infra, pp. 45-54.

In §8(c), the object of the parties was to govern the ILA's relations not with any employer but only with the "employer members of NYSA". Moreover, the object was even more limited because it dealt only with the "loading and discharging of containers for employer members of NYSA" (emphasis added) -- in other words, containers packed with cargoes that were shipped directly to these members for consolidation on or for their own accounts. The fact that it was only these types of for-their-own-account containers that were within the intendment of the parties is rendered crystal clear by the subsequent precautionary clause providing that ILA labor would perform the work wherever it was to be performed, whether on piers or terminals or whether "through direct contracting out". As the only consolidation work that the NYSA members could contract out, however, was that connected with cargoes shipped directly to them for containerization on their own accounts, it can hardly be suggested that §8(c) could apply to any containers other than those for-the-account of NYSA members. And certainly it cannot be suggested, as both the NYSA/ILA argue, that §8(c) established an entire regime for the containers of all consolidators, NVOCCs, and freight forwarders containing "LTL and consolidated cargo originating in or destined to a point within the area of the Port of Greater New York" (NYSA Brief, p. 16). These words, not to mention the sophistication of the thought, just do not appear in, nor can they conceivably be interpreted from, §8(c).

This then leaves only §8(b) which, together with §§8(a) and 8(c), forms a perfectly logical agreement with four distinct and square

corners. For while §8(c) sets up a separate regime for those containers over which NYSA members had direct control (i.e., those with cargoes to be consolidated on or for their own accounts), §8(b) sets up a regime applicable to all other containers which are, as §8(b) reads, "loaded or unloaded away from the pier by non-ILA labor". Obviously this latter regime distinctly and plainly contemplated all containers of NVOCCs, forwarders and consolidators (as well as, of course, manufacturers) because only their containers, unlike the containers provided for in §8(c), could have been not only loaded or unloaded away from the pier but so loaded or unloaded by non-ILA labor. (The "direct contracting out" provision of §8(c) of course precluded the use of off-pier non-ILA labor by the NYSA members on any of their own-account containers). In short, the differentiation was simply between those containers which were loaded on the pier by ILA labor and all other containers which were loaded away from the pier by non-ILA labor. And while agreeing, pursuant to §8(a), that the latter containers would not be stripped by the ILA, the parties concluded that some form of payment would be worked out to reward or compensate the ILA for having abandoned any claim it may arguably have had vis-a-vis the cargoes of such containers.

Nothing, we submit, could be more logical and rational than this simple and straightforward interpretation. Accordingly, the Board was plainly correct in concluding, as it did (199a), that even if the ILA might arguably have "had a superior claim prior to 1959 to the stuffing and stripping work here in controversy", the ILA:

> ...abandoned that claim by its 1959 contract with NYSA. Thus, section 8(a) of that agreement provides that "Any employer shall have the right to use any and all type of containers without restriction or stripping by the union." Plainly, this language is designed to ensure that there would be no restriction on the handling of any type of container, including LTL or LCL containers. The only qualifications specified, which are contained in section 8(b) and (c), provide the quid pro quo for this concession. Section 8(b) provides for the payment of royalties on "containers" which are loaded or unloaded by non-ILA labor away from the pier. Section 8(c) requires that ILA labor be used to perform container work actually performed for NYSA members themselves, whether at their terminals or by their subcontractors. Since Consolidated and Twin are customers rather than subcontractors of NYSA members, their containers obviously do not fall within the purview of Section 8(c).

These findings by the Board are not only supported by substantial evidence on the record but they are the only findings that could have been reached without doing violence to the Agreement itself. Moreover, as we shall next show, subsequent events in the courts and on the piers clearly confirm the validity of these findings.

3. The ILA/NYSA Arbitral History Immediately Following The 1959 Agreement Confirms The Board's Conclusion of Abandonment

a. The Stein Award

Shortly after conclusion of the 1959 Agreement, and in accordance with the mandate of §8(b) of that Agreement, the parties attempted to negotiate "the question of what [royalties] should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor." In light of the critical financial importance of this question to both the union and the carriers, it is not surprising that their negotiations "did not produce agreement, and the issue was thus finally submitted to a Board of Arbitration" (337a). This board, which consisted of F. M.

McCarthy, NYSA designee, Thomas W. Gleason, ILA designee, and Emanuel Stein, impartial chairman, held "extended hearings" (337a-338a) and heard "[e]xtensive testimony, both factual and opinion in nature, [which] was offered by the parties as to the nature of containerization, the probably near-term trends in the utilization of containers, employment and earnings in the Port of New York . . . and the actual and prospective impact of containerization upon employment opportunities of ILA members" (338a).

Considering the tasks undertaken by this arbitral board and the sincerity with which they performed these tasks -- evidence of which is provided simply by the analytical care and clarity reflected in the terms of the final award -- there can be absolutely no question but that, if the ILA had ever once stressed the purported distinction which it now alleges existed in the 1959 Agreement between shipper-loaded and other (i.e., LTL local consolidated) containers, during any phase of the arbitral process, that distinction would have received some attention somewhere in the terms of the final award by Mr. Stein. And if not there, the distinction should certainly have appeared somewhere in Mr. Gleason's lengthy and ringing dissent (374a-380a). After all, it would have been in his interests to emphasize that, as royalties were purportedly surrendered on all local LTL containers -- or so the NYSA/ILA argument goes today (ILA Brief, p. 10; NYSA Brief, pp. 16, n. 11, 47-48)[11/] -- this was a point that should have moved the majority to award higher royalties than they in fact awarded.

11/ In any event, under the Stein award, as we understand it, royalties were not to be paid on a per container basis but rather on a gross ton basis that varied with the type of ship (330a-331a).

Suffice it to say, however, that no such distinction ever appears throughout the length and breadth of either the majority or the dissenting opinion. And when Mr. Stein undertook to frame the central issue, he differentiated containers, just as did the terms of the 1959 Agreement, simply on whether they were stripped and stuffed on the pier by ILA labor or "away from the pier by non-ILA labor." In his words (334a):

> Containers may be loaded or stripped on the pier by ILA labor. They may also be loaded or stripped away from the pier by non-ILA labor. The latter, commonly, called "shipper-loaded containers," are the subject of the present controversy, since ILA has made no claim [for royalty] as to containers which are loaded or stripped on the piers by ILA-labor. 12/

Nowhere is there even a scintilla of a suggestion that, as ILA/NYSA now argue, local LTL off-pier consolidated containers were to be differentiated from all other containers stripped and stuffed "away from the pier by non-ILA labor."

Nor we might add can ILA/NYSA now try to argue that off-pier local consolidation by non-ILA labor was so "embryonic" (ILA Brief, p. 25; NYSA Brief, p. 7) at that time as not to deserve or warrant even the slightest mention anywhere in the award or the dissent. For if such consolidation were of such miniscule importance in November 1960 when the award was issued, how could it be argued that such consolidation was so much more important one year earlier when the 1959 Agreement was adopted. In short, ILA/NYSA again simply cannot have it both ways.

12/ See also the summary of the award (330a-331a) which was issued simultaneously with the award and which likewise spoke only in terms of amounts being paid "on containers which are loaded or unloaded away from the pier by non-ILA labor." Moreover, this summary, unlike the decision itself, was signed by Mr. Gleason.

The truth of the matter is, and was, that by 1959 both NYSA/ILA were fully aware of off-pier non-ILA consolidation in New York but, as the NLRB so found (199a), the ILA in the 1959 Agreement chose to abandon any claim it may have had to such work in return for the quid pro quo of royalty payments for all containers loaded away from the pier, including those of the local LTL variety. The absence throughout the Stein award of any mention of such local non-ILA consolidated containers is positive proof of the accuracy of the Board's finding. And that the ILA may have been deeply disappointed with the amounts of the royalties awarded by Mr. Stein is no basis for permitting the ILA now to go back on its arms length agreement of 1959.[13/]

b. The United Cargo Corporation Litigation

Following the Stein award, a dispute erupted between U.S. Lines and ILA, with the latter asserting that, under the 1959 Agreement, it had the right to strip and restuff 27 containers of cargo that had arrived in the United States aboard U.S. Lines, consigned to a well-known New York City consolidator/NVOCC, United Cargo Corporation. U.S. Lines, relying on the same agreement, argued that said Agreement not

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13/ Unfortunately the record contains no indication of the amount of the payments which the ILA received pursuant to the Stein award. Such payments, however, commenced as of July 1, 1960 and are presumably continuing to date. See 511a. Litigation which took place between NYSA and ILA from 1962 to 1964 seems to indicate that a formula different from that recommended by Mr. Stein might also have been in use. See ILA v. Seatrain Lines, Inc. et al., 212 F. Supp. 653 (S.D.N.Y. 1963), rev'd., 326 F. 2d 916 (2d Cir. 1968). But the real significance of both of these decisions may well lie in the fact that, like the Stein Award, both the District Court (per MacMahon) and this Court (per Hays), in their respective decisions, referred only to "preloaded cargo containers" (212 F. Supp. at 654; 326 F. 2d at 918) as being the cause of the NYSA/ILA dispute, making absolutely no distinction between so-called shippers' loads and local LTL consolidated loads. Moreover, both courts agreed that the entire dispute was settled when the employers agreed to the quid pro quo of paying a certain sum of money into a fund.

only did not give the ILA any such right but that U.S. Lines was obligated to deliver the containers intact "without stripping them." The case was first referred to arbitration, with the Port Arbitrator, Burton B. Turkus, concluding, after hearings, that the ILA had "violated" the 1959 Agreement and that the 27 containers should be delivered to United Cargo "without stripping."

The ILA next moved the New York Supreme Court to vacate the award. But that Court, in completely affirming the Port Arbitrator, held that the ILA's refusal to deliver the cargo was a violation of the 1959 Agreement which, in the Court's terms, "specifically obligates the union to deliver these containers to the consignee without restriction or stripping at the pier, upon payment of the required royalty." In re New York Shipping Assn., 54 LRRM 2680, 2681 (N.Y. Sup. Ct., N.Y.C., 1963). We submit that these decisions, by both the Port Arbitrator and the New York Supreme Court, are demonstrative contemporaneous evidence, in addition to the terms of the Stein Award, confirming the NLRB's conclusion as to the intent and effect of the 1959 Agreement.[14/]

14/ Before the NLRB, NYSA attempted to distinguish New York Shipping Assn. by arguing that the 27 containers there involved were "shippers' loads" and were "owned or leased" by United Cargo (see NYSA's "Reply to Exceptions", p. 32 at n. 10). These distinctions, however, are fanciful. For it is common knowledge that United Cargo Corporation is only a consolidator/NVOCC and hence could not have had any beneficial interest in the cargoes of any, let alone 27, containers so as to render them "shippers' loads." Second, that the containers were "owned or leased" by United Cargo was at that time, as NYSA well knows, a totally meaningless distinction -- unless it be, of course, that NYSA is now trying to introduce still another new interpretation into the 1959 Agreement, namely that, like shippers' loads, local consolidated containers were also exempt from stripping if they were "owned or leased" by the consolidator. But as with shippers' loads, no such limiting exemption language appears anywhere in the 1959 Agreement. Nor was such an interpretation known or applied when, in 1973, TEI paid $25,000 to rent containers from a rental company, but these very containers were still stripped and restuffed by TTT when they arrived at the pier (see supra pp. 23-24, 26, 27).

B. All The Evidence Relied On By NYSA/ILA To Establish A Contrary Conclusion Does Not Withstand Scrutiny

1. Introduction

As pointed out earlier, supra pp. 19-20, once NYSA/ILA realized they could no longer establish an ILA make-work tradition of stripping and restuffing, they had to, and did, develop a new approach -- which we characterized as being based on "what allegedly should have been" rather than on "what actually was". To support this new approach, NYSA/ILA advanced two basic arguments: (1) that, even though virtually no stripping and restuffing occurred, all of their witnesses testified that the "1959 agreement was consistently and undeviatingly interpreted by NYSA and ILA . . . to require stripping and [re]stuffing of local LTL" containers on-pier by ILA labor (emphasis added) (see NYSA Brief, pp. 16-20, 45-48; ILA Brief, pp. 7-10); and (2) that, in any event, the only reason why such stripping and restuffing did not occur was because of the "deliberately evasive and misleading tactics of the shippers" and the "nefarious practices among the disingenuous carriers" (ILA Brief, pp. 12-13; NYSA Brief, pp. 22-26).

While thus plainly conceding that no stripping and restuffing occurred, this two-pronged argument holds not only that it allegedly should have occurred but that the reasons why it did not occur cannot be attributed to the ILA. Accordingly, so ILA/NYSA would now have the Court conclude, the 1959 Agreement and the consistent practices thereunder from the 1950's through February, 1973 should be read, in effect, as though stripping and restuffing actually did occur. So far as TEI is concerned, such a conclusion could in no event rationally be

accepted even if the two-pronged argument was in fact accurate. But we shall show below that even the two prongs of the argument are not supported by the record.

2. The Evidence Does Not Establish Any "Consistent" Let Alone "Undeviating" "Interpretation" Suggesting That The ILA Retained Jurisdiction Over The Off-Pier Consolidation Work Here In Issue

In its brief (at pp. 16-17), NYSA categorically declares that the "1959 agreement was consistently and undeviatingly interpreted by NYSA and ILA . . . to require the stripping and stuffing of local LTL and consolidated containers at the piers by ILA labor." NYSA's first -- and presumably most important -- element of evidence to support this declaration is the assertion that appears in paragraph (1) on p. 17, i.e., "[t]he Chief Executive Officer of Sea-Land. . . testified without rebuttal that since 1961 . . . he knew that under the then existing labor agreement (1959 Agreement) Sea-Land was required and it was Sea-Land's fixed policy to stuff and strip all LTL and consolidated containers." NYSA then cites as authority for this assertion the testimony (pp. 956a, 968a-970a) of Captain Nicholas who, though not Sea-Land's Chief Executive Officer, was Sea-Land's official responsible for pier operations at Port Elizabeth. On direct examination, it is of course true that Captain Nicholas in fact categorically stated that Sea-Land's practice of stripping and stuffing "never varied" at least "from 1966 through 1972" (968a). But this same Captain Nicholas, on cross-examination, was later to concede not only that he had never "personally seen an entire box stripped" (960a) but that his knowledge of stripping and stuffing was based exclusively on the "seal changes" (which, of course, are now conceded by all parties to have been dummied and phonied up). In truth, therefore, Captain Nicholas'

testimony is largely valueless and certainly in no way supports the assertion as to a "fixed policy."

But then, for further evidence to support the assertion, NYSA cites pp. 1076a-1078a of the Joint Appendix, which is indeed the testimony of Mr. McEvoy, Sea-Land's Chief Executive. But in this testimony, Mr. McEvoy carefully limits himself merely to saying that LTL or consolidated container cargo "was handled" at Sea-Land's waterfront facility -- a far cry from the stripping and restuffing which NYSA was then trying to prove. To be sure, Mr. McEvoy later (on pp. 1084a-1085a) does finally substantiate the assertion when he replies "That is correct" to his counsel's blatantly leading question. But with the knowledge that we have today -- namely, that thousands of CEI and TEI containers passed over the piers since the mid-1960's without ever being stripped and stuffed -- it is absolutely clear that Mr. McEvoy either did not understand his counsel's leading question or that, like Captain Nicholas, Mr. McEvoy too had never even once personally seen a container being stripped and was, therefore, in no position to testify as to Sea-Land's so-called "fixed policy." For nothing can be more clear from the instant record than that, if Sea-Land ever had such a policy, it was not only not "fixed" but it was honored only by its consistent breach.[15/]

Then in paragraph (2) on page 17 of its brief, NYSA asserts that the "highest NYSA officers similarly testified that . . . the practice on the piers since 1959, was to stuff and strip consolidated containers". But in support of this assertion, NYSA relies principally on the

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15/ It should be noted that, like NYSA, the ILA in its brief similarly relies on this identical, but dubious, testimony of Mr. McEvoy as the principal support for its argument that its members were always stripping and restuffing. See ILA Brief at p. 9, para (a).

direct testimony of its Captain Haynes (at 992a-998a), never mentioning of course that, like Captain Nicholas, Captain Haynes was also to be totally discredited later on cross-examination, simply because he too had never once seen a container stripped and he too had based his testimony almost completely on hearsay reports "that came through the routes" (1052a). To be sure, NYSA also tried to use NYSA President Dickman to support the assertion (903a), failing to note, of course, that President Dickman did not become President of NYSA until 1971 or 1972, by which time the stevedoring interests had already gained control over NYSA (841a, 897a). Nor evidently did NYSA think it suitable to mention that President Dickman was once -- and perhaps may still be today -- an ILA member (841a), that he presently is (or was) President also of one of the largest stevedoring companies in the world (841a), that said company would clearly stand to gain financially were all consolidation work now to be forced onto the piers (897a-898a) and that, most importantly, Mr. Dickman was not even a member of the NYSA or ILA negotiating group that concluded the 1959 Agreement (888a-889a, 902a).[16/]

Further, in paragraph (3) on p. 17 of its brief, NYSA boldly asserts that, in 1962, NYSA "clarified its interpretation of Section 8(c)" so as to give the 1959 Agreement the meaning that ILA/NYSA now says it has today. But NYSA fails to point out that this so-called clarification is nothing more than a veritable scrap of paper -- only a xerox copy of which is in the actual record -- which copy appears to

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16/ It should be noted that, like NYSA, the ILA in its brief similarly relies on this identical, but dubious, testimony of Captain Haynes and President Dickman. See ILA Brief, p. 9, para (b).

show neither a letterhead, nor an addressee, nor a signature block, nor a signature (284a). In short, as evidence, this document lacks even the most minimal prerequisites. Even more unusual is the fact that Mr. Dickman, the very witness through whom this allegedly critical clarification was sponsored into evidence, later admitted on cross-examination that he was not even a member of the ILA/NYSA Labor Policy Committee when this so-called "clarification" was allegedly advanced (888a-889a). In other words, the sponsoring witness had absolutely nothing to do with the preparation of this "clarification" -- whether by the ILA or the NYSA -- nor did he have anything to do with presenting it to the Committee, nor was he on the Committee that received it. A less capable witness to sponsor a more questionable submission of documentary evidence could hardly be imagined.[17/]

The testimony of one other ILA/NYSA witness, TTT's Vice President for Operations, Captain B. Szolkowski, deserves mention (906a). Like his two predecessors Captains Haynes and Nicholas, he too categorically asserted on direct examination that all LTL or consolidated containers were stripped and (re)stuffed (906a-909a). But again like Haynes and Nicholas, he too admitted on cross-examination that he had no personal knowledge of the stuffing and stripping work and that his testimony had been based solely on the signature on the tally sheet (924a-925a) (as to which, see infra pp. 51-52). From this point on, Judge Lacey's decision in the CEI litigation (364 F. Supp. at 223) best describes Captain Szolkowski's testimony:

17/ Typically, the ILA in its brief likewise relied on this same "evidence" and its sponsor. See ILA Brief, p. 10. It might also be noted that in its Reply Brief before the Board, NYSA went so far as to characterize this "evidence" as an "illuminating document . . . [which] demonstrates conclusively that the 1959 labor Agreement recognized the ILA's traditional right to load and unload [sic] consolidated LTL containers. No words in the English language could be clearer," NYSA concluded (NYSA's Reply to Exceptions, pp. 25-26).

> A specific dock receipt was shown to the witness where a CEI shipment was received by TTT aproximately one hour before sailing time. When asked how this trailer could be stuffed and stripped, the witness stated that if it took 18 man-hours to strip and stuff a container, it could be rehandled in one hour by assigning 18 men. He did concede that 18 men would fall over each other and that this might even be dangerous to have this number of men working, but he still claimed it could be done in the hour, although it would not be economical.

We could easily continue on like this, but we think the foregoing more than adequately shows that the testimony relied on by NYSA/ILA just does not prove that the ILA had any contractual or other claim to the work here in issue at any time prior to 1968. Nor certainly does it prove or even persuasively suggest anything about "what allegedly should have been."

3. The Evidence Of Record Clearly Indicated That, If ILA Were Not Active Participants In, They At Least Knew Or Should Have Known About The Thousands Of Containers Passing Over The Piers Without Restuffing.

One of the most curious aspects of this case involves the question of just how so many thousands of containers of consolidators, like CEI and TEI, indisputably did get placed on vessels for sailing without having been previously stripped and restuffed by the ILA -- certainly after 1968 by which time the rules had concededly been adopted. It is the ILA position, of course, that it and all of its members were the poor innocent victims not only of the "deliberately evasive and misleading tactics of the shippers" including "payoffs", but also the "illicit" and "nefarious practices among the disingenuous carriers" (ILA Brief, pp. 12-13). For its part, NYSA also speaks of "payoff" and "evasion" and false documents "prepared by the carriers to satisfy NYSA

and ILA that the consolidated containers were being [re]stuffed and stripped" (emphasis added) (NYSA Brief, pp. 23, 25). It is most important, of course, to exonerate ILA totally because, so ILA/NYSA now hope, by placing the blame elsewhere for the thousands of containers that were never stripped and restuffed, ILA's alleged clean and unblemished record of allegedly insisting on this work regularly from 1958 through 1972 can arguably remain totally intact.

Even if such a clean record could arguendo be established, we doubt that it would in any case impinge upon the long tradition built up by off-pier consolidators. But no such clean record can in any event be established. For as we read the tally sheets (see e.g., pp. 288a, 290a, 299a, 306a, 682(79), 682(87), 682(94), 682(104), 682(108)) that were signed on each occasion that a container purportedly fell within the requirement but was nevertheless shipped without being stripped and restuffed by ILA labor, the individual signing these sheets -- and thus falsely stating that the container had been restuffed by ILA labor -- was himself an ILA member. In short, if any hanky-panky was going on at the docks concerning these containers, it was carried out by ILA labor. For it is undeniable that the "checker" who signed or initialed each of these hundreds of concededly "false" (see ILA Brief, p. 9) stripping tallies was none other than an ILA checker (see e.g., 411a indicating that "container documents are initialed by an "ILA checker"; see also 415a under "remarks" referring to "a sheet signed by an ILA checker"; 417a referring in the second line to "ILA checker's tally"; 453a referring to "new seal numbers assigned and initialled by an ILA checker"; 456a; 457a; 470a; 483a; 682(120)). Nor can it conceivably be argued that the signatures were all forgeries committed

by "evasive" shippers or "nefarious" carriers. For this kind of regular and open activity simply could not have gone on wholly unbeknownst and, indeed, undiscoverable by anyone in the ILA -- especially in the face of what is so repeatedly held out today by both NYSA/ILA to be the ILA's most all encompassing and inclusive work jurisdiction at the pier (NYSA Brief, pp. 5-6, 10-13; ILA Brief, pp. 6, 8-9, 18-19). In other words, the ILA either not only knew about and intimately participated in the means to avoid restuffing, or their jurisdiction at the piers is not even a shadow of what ILA/NYSA today hold it out to be.

Here again, ILA/NYSA simply cannot have it both ways. Either the ILA's jurisdiction and work on the piers was sufficiently broad and panoramic such that the ILA clearly knew all about all the alleged "evasions" -- in which event their complicitly in permitting thousands of containers to evade stripping and restuffing clearly belies their contention that they always preserved this work; or they knew nothing about the evasions at all -- in which event their historical work functions were not even a whit of what they now allege and would like the Board to believe. Given either event, however, the NYSA/ILA case on this most critical point must fall.[18/]

18/ The ILA argues (Brief, p. 12) that two of TEI's drivers, Messrs. Longo and Pinero, regularly "observed two Sea-Land agents change seals . . . on the trailers" without any stripping being done. While TEI agrees that these seal changes were obviously for purposes of evading the restuffing rules following the 1968 Agreement, it is quite clear that TEI's drivers played no part at all in the changes. Even more importantly, the record does not support the ILA contention that it was "Sea-Land agents" who were involved. To be sure, a Sea-Land panel truck was used (1152a-1153a, 1160a) to go around the docks and change the thousands of seals that were apparently changed. But in their testimony, neither Longo nor Pinero, to our knowledge, identified the individuals in the truck as Sea-Land agents or employees. Indeed, they appear to have reported to their employer, Nester Sanjurjo, "that they saw ILA checkers take off the TEI seal and put on a Sea-Land seal without stripping the container" (717a). Moreover, the openness and regularity with which this panel truck and its occupants performed their mission proves that the ILA obviously knew about -- and hence fully condoned -- the activity even if the occupants of the truck arguendo were Sea-Land agents.

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Where then does this leave the ILA/NYSA case. They obviously cannot establish any history showing anything other than that CEI and TEI consistently stripped and stuffed their own thousands of containers which, except for one or two wholly isolated forays by the ILA, invariably passed over the docks without ever being stripped and restuffed. They likewise cannot even establish a persuasive history as to "what allegedly should have been" because their witnesses, viewed in the most favorable light, had little or no first-hand knowledge as to the critical facts. Finally, even if one were arguendo to accept the "what allegedly should have been" theory and even if one were to say that the carriers and shippers all knew of the "rules" in detail from as early as 1958, this too must fail in the face of the fact that, whether directly or indirectly, the ILA participated in -- and thus fully condoned -- the tradition that was unalterably established on the basis of the thousands of LTL containers that were consolidated off-pier and that passed over the piers from the dawn of containerization to February, 1973, without any stripping or restuffing by the ILA.

Finally that the ILA may have at some point consolidated -- and may still be consolidating -- those break bulk cargoes which are shipped directly to or for the account of the vessel owners, clearly does not mean that the ILA ipso facto has the right to monopolize all the consolidation work heretofore performed by all the off-pier consolidators, NVOCCs and forwarders in the Greater New York area. In other words, that the ILA may have done, and may still be doing, some of this work for the vessel owners on pier does not mean that they have the right to insist, as they are doing here, that all the work performed

by employees of off-pier consolidators necessarily also belongs to the ILA and must all be done on-pier.[19/] For as the Board so cogently found, not only was this consolidation work never exclusively performed by ILA labor (198a), but off-pier consolidation is today a separate industry with its own established tradition of having its employees do its work (197a). And this is indisputably work which the ILA never had in the past and which today belongs to IBT Locals 707 and 807.

C. Even If ILA/NYSA Could Arguendo Establish A History Or Tradition As To The Work Here In Dispute, The State Of American Law As It Stands Today Would Still Not Permit Them To Achieve Their Objectives In The Circumstances Of This Litigation

1. Introduction

As we have shown above, and as the Board specifically found, the ILA not only abandoned whatever claim it may have had to the disputed work in their 1959 Agreement with NYSA but, unlike the carpenters in National Woodwork and the boilermakers in American Boiler Manufacturers' Association v. N.L.R.B., 404 F. 2d 547 (8th Cir. 1968), cert. den., 398 U.S. 960 (1970), the ILA here never exclusively had or performed the disputed work in the first instance (198a). For if anything is clear in this case, it is that off-pier consolidation in one form or another has been going on for decades; and off-pier consolidation into containers has been going on since the dawn of containerization. Here, therefore, we have two critically important circumstances which were totally absent in National Woodwork or American Boilermakers; and we believe that either of these circumstances alone, let alone both together, require a finding here that the ILA/NYSA activities are not protected under the Act.

19/ It should be noted in this respect that the record here shows that it was not until February 1973 and thereafter that Seatrain had any pier side facilities to do any stripping and stuffing (1029a-1030a, 1035a-1036a) or that TTT had adequate facilities to do any more than the very limited amount of its own such work (717a). Indeed, the record here further shows that it was not until November 1972 that NYSA/ILA decided to establish on-pier consolidation stations (498a, 501a-502a, 506a) -- obviously to handle the substantial new traffic they anticipated would materialize when they later enforced the new rules that they were right then simultaneously adopting (276a-283a, 506a).

But we are prepared to go even further and to argue that, even if the ILA had arguendo not abandoned the work here in dispute and even if at some very early time they arguendo had exclusively performed the work, nevertheless the activities here are not protected under the umbrella of the work preservation doctrine of National Woodwork. For encompassing though that umbrella may be, we shall show below that it does -- and should -- not go so far as to immunize the ILA/NYSA activities in this case.

2. The ILA Conduct Here Was Plainly Secondary In Its Objective, And Once The Adverse Effects Of Such Secondary Conduct Are Considered, As They Must Be, The Conduct Necessarily Must Be Deemed Unlawful

Whatever precedential value may be ascribed to the 4-4-1 decision in National Woodwork,[20/] TEI believes that the ILA's conduct here is substantially different and has substantially greater adverse secondary effects than were present -- or were ever actually envisioned -- by the four member majority in National Woodwork. Even that majority, to be sure, clearly recognized that work preservation claims could involve secondary effects (386 U.S. at 644-645). But that such secondary effects were not examined -- simply because they were not important, let alone a matter of record -- either in National Woodwork or in American Boiler Manufacturers is likewise clear. The reason they were neither important nor a matter of record, of course, was because the on-site work of the local carpenters in National Woodwork, like the local pipefitters in American Boiler Manufacturers, hardly made a dent, let alone had a sizeable adverse impact, on the work of the out-of-state pre-cut door manufacturers and package boiler manufacturers in those cases. The only way secondary effects could have been important in

20/ Before the Board, NYSA in its Reply To Exceptions (at p. 16) characterized the "rule in National Woodwork" as being "now an inviolate canon of labor law."

those cases would have been if all the union boilermakers or carpenters had insisted that on every union job throughout the country, no pre-cut doors or pre-fitted boilers could be used. This, we submit, might have had a secondary impact on those prefabricators at least somewhat comparable to the massive effect of the ILA's conduct on the off-pier consolidators here. For only in such circumstances might those fabricators of pre-cut doors and pre-fitted boilers have felt some adverse impact on their businesses. But as it was, they felt no effects whatsoever on their businesses, because it is a matter of common knowledge in the construction industry that the work of those prefabricators has not only continued, but has continued to burgeon.

In the instant case, on the other hand, the effect of vindicating the ILA/NYSA work preservation claim has become perhaps the most significant issue in this proceeding, because such vindication surely means the extinction of all off-pier consolidators like TEI and CEI.[21/] And it cannot be gainsaid that not even remotely comparable effects were even arguably present in National Woodwork or American Boilermakers.

Given this sharp and important difference between the cases, we think it clear that neither precedent supports, much less compels the result sought by ILA/NYSA here. If anything, we believe that both precedents support the result sought here by TEI, CEI, and the Board. For in merely recognizing, as both the Courts plainly did in National Woodwork and American Boiler Manufacturers, that secondary effects must

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21/ See n. 8 supra.

be taken into consideration, both Courts clearly recognized that they could be faced, as here, with a situation where the secondary effects even of an arguendo valid union claim to work preservation could nevertheless be so substantial as to permit of no other conclusion than that the union's objectives were secondary and hence violative of the Act. When the Board here focused on the off-pier consolidation work and concluded that this was the work in dispute (196a), the Board was truly doing nothing more than looking to the surrounding circumstances and weighing the secondary effects. And when the Board, as it did here, found a violation of §§8(b)(4) and 8(e), it was with the full knowledge and appreciation that here, unlike National Woodwork and American Boilermakers, the secondary effects really meant the total extinction of businesses which, however small as compared to the ILA or the NYSA, nevertheless had histories and traditions of container consolidation as long, if not longer, than the ILA itself.

We certainly know of no precedent that would permit -- much less, as NYSA/ILA here argue, require -- the Board to totally ignore undisputed serious adverse secondary effects in every case where a union has established even a valid work preservation claim, let alone, as here, a claim which at best is seriously disputed. So far as we are concerned, not only can such serious secondary effects not be ignored, but the totality of such effects is in itself critically important evidence in determining whether abandonment indeed occurred. For it is obvious that the more serious and pervasive the adverse secondary effects are that ensue on the vindication of a union's work preservation claim, the more it can be reasonably concluded that the union had earlier abandoned or relinquished the particular work in dispute. Moreover, the more

serious and pervasive that the adverse secondary effects are, the less appropriate it must be to vindicate a work preservation claim -- even if valid.

In other words, we are aware of absolutely no principles of law that, as here, would in their application permit a conclusion which would be so totally disruptive of, and destructive to, not only vital technological advances of undisputed value to the American shipping and consuming public, but to the very right of small business enterprises, such as CEI and TEI here, to continue the businesses they have each spent so many years and so much effort building up. So far as we are concerned, cases of this delicate yet important nature simply cannot be decided merely on per se theories or applications of law purportedly holding that everything else must fall in the face of a union claim to work preservation. Nor do we interpret National Woodwork or any other pertinent precedent as requiring the forced sacrifice of important technological advances or the forced termination of well and long established small business enterprises simply because doing so would, on the other hand, permit a union to preserve its work -- even when preserving that work, as here, could well be looked upon as wholly contrary to the public interest.

Every case of this type, to use the Board's own traditional language, must not only be decided on its own facts but must involve a fair balancing of competing legitimate interests; and this case is no exception. We may as well say that all technological progress is hostage to, and totally at the mercy of, union claims to

work as to reach the conclusion on the basis of the legal issues framed by ILA/NYSA here. We know of no precedent that would permit such consequences, and we cannot imagine that such precedent would emerge for the first time from this Court.

In sum, we believe and herewith submit that even if the ILA here had a totally valid and indisputable historical work claim to the precise work presently performed by TEI's employees and the employees of other off-pier consolidators -- a claim which, as previously demonstrated, they in any event clearly do not have -- nevertheless there is no precedent that would sanction the vindication of that claim in the face of the recognized adverse secondary effects that would be suffered upon the entire off-pier consolidation industry in and around New York, not to mention the adverse effects that would be suffered upon the American shipping and consuming public. And when these effects are weighed and considered, as the Board so properly did, the conclusion is ineluctable that, even if the ILA claim were arguendo valid, its conduct together with the NYSA here must clearly be deemed to violate §§8(b)(4) and 8(e) of the Act.[22/]

22/ As further buttressing our case that the ILA/NYSA efforts here clearly have a secondary objective, we note the fact that the ILA/NYSA are attempting to impose their stripping and restuffing requirement only on off-pier consolidators within the 50-mile circle of the New York Port. This means that their requirement is to be imposed only on some 20% of the containers passing over the piers; and NYSA/ILA both use this allegedly "modest" percentage to suggest that their requirement really represents the utmost of reasonableness. To be sure, and as the Board astutely noted (200a-201a), should they succeed here, nothing would prevent them from taking on the other 80% just as they are here taking on the first 20%. For there is simply no rational legal basis for discriminating between the 80% of other containers and the 20% of LTL off-pier consolidated containers. There is, however, a very rational practical reason for such discrimination, namely, that even NYSA/ILA, despite their unprecedented unity together, cannot suddenly try to enforce their requirement against the other 80%, because it would just not be tolerated by the American public. But they can enforce -- or at least try to enforce -- their requirement against the 20% because the businesses comprising this 20% are all, like TEI, relatively small, some father and son operations; and as targets for extermination, these businesses are clearly the least politically and financially powerful, the most accessible and, without doubt, the easiest to exterminate. These circumstances, however, only serve to underscore the very clear secondary nature of the NYSA/ILA objectives here.

3. The ILA/NYSA Activities Here Are In Any Event Unlawful Because Their Purpose Is To Monopolize Work

ILA/NYSA argue that it is wrong for the Board to focus either on the tradition of off-pier consolidation work or on the effects that their activities will have on the continuation of that work. We argued above that it would be wrong for the Board to wear blinders and, as ILA/NYSA ask, to ignore very obvious and very serious secondary effects. We concluded, therefore, that even if a valid work claim might arguendo be involved, serious secondary effects ought to be considered in determining whether to vindicate the claim. Whether or not that argument is persuasive, however, the circumstances here are such that, as required by the express terms of National Woodwork, we must focus on the fact that, beyond mere secondary impact, the ILA objective here is not just that of eliminating all off-pier consolidators such as TEI and CEI, but it is, without the slightest doubt, to monopolize for ILA labor all the work previously performed by these consolidators. Perhaps, even in the face of this, ILA/NYSA might still argue that the work in dispute is not that being performed by the off-pier consolidators. Or perhaps they might still argue that, monopoly or not, this must be ignored because it is nothing more than the "incidental" effect of its purported primary activity. But we think not.

For the ILA may use NYSA as a device through which to accomplish their objective, but their dispute is clearly with -- and their "tactical object" (National Woodwork, 386 U.S. at 645) is clearly to destroy -- all the off-pier consolidators. In short, unlike the circumstances in National Woodwork, the ILA's singular and only purpose here was and remains "to reach out and monopolize all the [local consolidation] job tasks for [ILA] members." National Woodwork, supra at 630. Justice Brennan clearly implied, if he did not expressly hold by those words,

that in any situation where monopoly objectives are in mind, no work preservation claim would or should be upheld. We are persuaded that the instant case is precisely such a situation. Furthermore, had the instant circumstances ever been present in National Woodwork or American Boilermakers, we think there can be no doubt how those cases would have been decided. For it cannot be gainsaid that here both ILA and NYSA full well knew and understood that these precise monopolistic consequences would "flow from the [rules], in view of the economic history and circumstances of the industry, the locality and the parties." Meat and Highway Drivers Local 710 v. N.L.R.B., 335 F. 2d 709 at 716 (D.C. Cir. 1964); Sheet Metal Workers Int. Assn., Local 223 v. N.L.R.B., 498 F. 2d 687 at 693 (D.C. Cir. 1974). Given these circumstances, the conduct here involved must be deemed unlawful even if the work in dispute were "fairly claimable" by ILA which, in any event, we believe was clearly not the case.

Moreover, as Judge (now Justice) Stewart so aptly observed in NLRB v. Local 11, United Brotherhood of Carpenters, 242 F. 2d 932, 934 (6th Cir. 1957):

> "The fact that there was not an active labor dispute between the respondents and the producers of the doors [or, as here, the off-pier consolidators] would not serve to immunize the [petitioners] from the terms of §8(b)(4)(A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation [emphasis added] [citation omitted].

See also Joliet Contractors Association v. NLRB, 202 F. 2d 606 (7th Cir. 1953), cert. den. 346 U.S. 824. Indeed, in the instant case, it is a fact that NYSA was the only route through which the ILA could accomplish its objective. For had the ILA tried to make a direct attack on the consolidators, it would have been immediately repulsed -- just

as it had been previously and regularly repulsed -- by the IBT (68a-70a). In sum, this case in fact involves an attempt "to reach out and monopolize". As such, it falls without doubt beyond even the most extended protections arguably afforded by National Woodwork.

We wish finally to note, in connection with the National Woodwork decision, our full agreement with Justice Brennan's observation (386 U.S. at 645) that determining the validity of a work preservation claim "will not always be a simple test to apply. But [h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." The myriad of cases cited by NYSA/ILA as purportedly upholding their point of view (see NYSA Brief, pp. 34, n. 18, 43-45; ILA Brief, pp. 30-34, 48) do nothing more than offer precedents limited to the specific facts of those cases, hardly helpful in the face of the unique facts present here. Moreover, to the extent previously decided similar cases might be helpful, we look to Local 11 and Joliet Contractors, supra, which, though decided before National Woodwork, are specifically cited by Justice Brennan as being correct and proper decisions within his "not always . . . simple test." See 386 U.S. at 645, n. 41. Nor can it be gainsaid that to the extent those two decisions are integral parts of, or guidelines for, the test that Justice Brennan mandated, the ILA/NYSA work preservation claim here is a fortiori unlawful.

D. This Court's ICTC Decision Does Not Require a Contrary Conclusion

As we read both the ILA and NYSA briefs, particularly in the face of all the foregoing arguments, we think it crystal clear that, when all is said and done, both look upon this Court's decision in Intercontinental Container Transport Corp. v. NYSA and ILA, 426 F. 2d 884 (2nd Cir. 1970) as being the best, if not only, stone in their sling. The frequency with which that decision is cited and relied on by both petitioners throughout each of their briefs permits of no other conclu-

sion.(See e.g., NYSA Brief at pp. 5, 7, 9, 12, 26, 29-30, 32-33, 35-37 and 39). And though not expressly so concluding, both parties imply that, because essentially the same facts were in issue there as here, collateral estoppel if not res judicata requires a similar finding here. But petitioners are wrong for several reasons.

Initially, arising as it did in 1969-1970, the ICTC litigation did not involve the infamous and draconian Dublin Rules, which were not adopted until 1973 and which alone were responsible for the Board's seeking the injunctive relief which it did here before Judge Lacey. Moreover, the fact that thousands of TEI and CEI containers were concededly passing over the docks during this very 1969-1970 period without any stripping and restuffing by the ILA, makes it abundantly clear not only that the facts in ICTC were totally different than those now before the Court but that, at best, the court in ICTC was faced only with what appeared to be a selective application of the 1968 contract and perhaps only against ICTC. In short, totally unlike the facts here, the entire off-pier consolidation industry was not in danger of extinction in ICTC, nor were all off-pier consolidation jobs sought as part of a monopolization effort by the ILA. Work preservation issues under such circumstances are, it goes without saying, considerably less difficult to resolve than are those here -- and particularly when, as we shall next show, such issues were in any event only incidental to the ICTC court's decision.

While the ICTC court did, indeed, hold that the ILA's objective there and at that time was "the preservation of work traditionally performed by longshoremen" (426 F. 2d at 887), that holding had virtually nothing to do with the final decision. For whatever the ILA objective may have been, the real and ultimate question faced by the ICTC court was whether, as in Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945), the ILA was "acting in combination with a group of employers" (426 F. 2d at 887). If not so acting, then whatever the ILA objective

may have been -- so long as it "was acting in its self interest" (as were the butchers in Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 697-735 (1965)) -- the ILA's conduct would have been outside the prohibitions of the Sherman Act. But if there were such a "combination with a group of employers", then the thrust of the court's decision in ICTC makes it clear that the ILA's conduct would have been proscribed by the Sherman Act even if it had been "acting in its self interest". It was, of course, easy for the ICTC court in 1970 (when the carriers still controlled NYSA and the stevedores had not yet taken over) to find, as it did (426 F. 2d 888), that in the 1968 contract containerization was a "bitterly contested issue. . . between ILA and NYSA" which was not finally settled until "after another strike of 56 days" and only after ILA had "forced reluctant employers to yield to certain of its demands."[23/] In short, NYSA was then truly a reluctant employer -- totally unlike the employers in Allen Bradley or in United Mine Workers v. Pennington, 381 U.S. 657 (1965); and these circumstances alone, we submit, rendered the NYSA and ILA immune from the Sherman Act, whether or not the ILA's activity was for a work preservation objective. In other words, the "work preservation" finding was totally unnecessary to, and hence dicta vis-a-vis, the Court's ultimate conclusion. Not only should that finding bear little or no weight in this case, therefore, but it also goes without saying that, unlike 1969-1970, the period after 1972 when stevedoring interests gained control over NYSA represented, and still represents, a time on the New York waterfront absolutely comparable to the time when there was that identical mutuality of union-employer interests in the New York electrical industry

23/ Indeed, in its brief before this Court in the ICTC case, NYSA opened by specifically observing that "[i]t is ironic that the NYSA is held by the opinion below to be in possible violation of the antitrust laws primarily because it has implemented work preservation rules, forced upon it and its members by a 56-day strike by the ILA" (emphasis added) (Brief of NYSA in Docket 34758, p. 2).

in Allen Bradley.[24/]

Finally, we believe the court should note the context in which ICTC was litigated. For once appreciating that context, there ought be no question as to the inapplicability of that decision as precedent here. Thus, it should be kept in mind that when ICTC was argued, the Acting Regional Director of the Board's 22nd Region had already decided not to issue a complaint on ICTC's charges filed before the Board and had so informed the parties by letter dated September 24, 1969 (269a). Of course, well-established precedent clearly holds that such a refusal on the part of the Board's General Counsel to issue a complaint has absolutely no relevance, let alone precedential importance. See 181a at n. 16.[24a/] Nevertheless, however, in the briefs which ILA and NYSA submitted to this Court in the ICTC litigation,[25/] both vigorously and repeatedly argued not only that the issues before the court were either res judicata or collaterally estopped in light of the Acting Regional Director's letter, but that, in any event, as NYSA so eloquently put it, "[t]he fundamental principle that NLRB jurisdiction in such a situation is primary and exclusive so as to preempt the District Court from subject matter jurisdiction is clear and well established" (NYSA Brief in ICTC, p. 15). But in speaking at that time of "[t]he need and wisdom of this primary and exclusive jurisdiction of the Board", NYSA/ILA little rea-

24/ Nor are we aware of any precedent that has ever established that, given an Allen Bradley type concerted and joint effort between a union and employers, antitrust immunity would ipso facto follow merely because the Union's object may have been that of "work preservation". Nor does Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), again involving "reluctant" employers, so hold. Indeed, Allen Bradley itself involved, as Justice Black stated in the very opening sentence of his opinion, labor union activities which were "prompted by a desire to get and hold jobs for themselves at good wages and under high working standards" (emphasis added)(381 U.S. at 798). Given these circumstances, it may well not be necessary for us to comment on whether, were the ICTC litigation to be brought now -- with the NYSA no longer a "reluctant" suitor and with the NYSA and ILA indeed aiding and abetting each other at every step -- the decision by the Court of Appeals would be different even were the Court again arguendo to find some "work preservation" objective on the ILA's part.

24a/ See also International Union of Electrical Workers v. General Electric Co., 407 F. 2d 253, 264 (2nd Cir. 1968), cert. den. 395 U.S. 904 (1969).

25/ Those briefs, as well as the Appendix containing the record before the District Court, may be found in a bound volume in this Court's files under Docket 34758.

lized that they would both be here today arguing almost exactly the contrary, namely, that the NLRB hardly knows what it is talking about and that this Court's decision in ICTC must be treated as primary, exclusive and unalterable in any way. We do not wish to belabor these previous positions on the part of ILA/NYSA except as to say that, with the Board now having ruled as it did, we can understand why ILA/NYSA no longer see any "need and wisdom" for the Board's "primary and exclusive jurisdiction."[26/]

Lastly, to the extent there still might be some lingering doubts as to the inapplicability of ICTC here, it is a fact that in the ICTC litigation before this Court, ICTC itself not only did not contest the validity of the ILA/NYSA container rules but specifically admitted that "they appear to be job-saving and would be just that if properly utilized" (ICTC Brief at p. 17). In short, ICTC there conceded the labor law validity of the very rules here in dispute, but argued that they nevertheless violated the Sherman Act. In the face of such a concession, however, we cannot imagine how the Court's finding there as to "validity" could in any conceivable way be controlling, or even useful here -- where the question of such validity is the principal issue in dispute. In sum, ICTC is just plainly unhelpful in any way as precedent here.

26/ Where there is a non-reluctant employer of the Allen Bradley type and where there is a disputed issue as to the lawfulness of a work preservation clause, we think the implications of the ILA/NYSA position in their briefs in ICTC may well be correct, namely, that a court should probably abstain from deciding that issue pending referral or certification thereof to, and decision by, the NLRB. See, e.g., Far East Conference v. United States, 342 U.S. 570 (1951); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966). In the labor law context, see International Assn. of Heat and Frost Insulators v. United Contractors Assn., 483 F. 2d 384, as later modified in 494 F. 2d 1353 (3rd Cir. 1974). We also think such an approach would be perfectly consistent with Local Union No. 189, etc. v. Jewel Tea Co., 381 U.S. 676 (1965) because in those circumstances, as Justice White himself recognized, "courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment" (381 U.S. at 686). But judicial experience in classifying work preservation issues is considerably more limited and, accordingly, at least in our view, such issues should first be referred for decision to the Board. Garner v. Teamsters, Chauffeurs & Helpers, Local No. 776, 340 U.S. 485 (1953); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

E. The ILA/NYSA Activities Here Must Be Deemed Unlawful On The Basis Of The Board's Decision in California Cartage As Affirmed And Enforced By The District Of Columbia Court Of Appeals

We submit that the facts now before this Court are identical to those facts presented by the analogous union-employer situation on the West Coast --which the Board expressly found, as here, to be violative of §§8(b)(4) and 8(e) of the Act. See ILWU, Locals 13 and 63 (California Cartage Co., Inc.), 208 N.L.R.B. 994 (1974), aff'd. sub nom., Pacific Maritime Association v. N.L.R.B., 515 F. 2d 1018 (D.C. Cir. 1975). Moreover, to the extent there may be differences between the facts of the two cases, those differences militate more towards a finding of illegality here than there.

In both cases, of course, the objectives of the parties were to stretch out and reach all locally consolidated containers, foreign as well as those owned or leased by the carriers (194a; 208 NLRB at 995) But in California Cartage, the specific terms of the critical 1960 ILWU/PMA agreement are considerably less clear in establishing abandonment than are the terms of the equally critical 1959 ILA/NYSA Agreement here. For nothing in the 1960 ILWU/PMA Agreement is anywhere near as precise as §8(a) here which accords "any employer . . . the right to use any and all type of containers without restriction or stripping by the union." Even more importantly, under the terms of the 1960 ILWU/PMA Agreement, it was the carriers which subcontracted out all their consolidation work, whereas here (no matter how assiduously ILA/NYSA might try to suggest otherwise[27/]) the Board specifically found that "[t]he consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their customers who have goods to ship" (197a). What this means for instant purposes, of course,

27/ See e.g, NYSA Brief, pp. 23-24, and 42, n. 23. This represents still another disputed factual issue which the Board properly resolved.

is that the all-important subcontracting aspect present on the West Coast could have placed the facts there totally within the proscriptions of Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). As no such subcontracting is present under the facts here, however, it is clear that if the West Coast facts were deemed violative of §§8(b)(4) and 8(e), such a finding should here follow a fortiori.[28/]

CONCLUSION

There are a host of other arguments that doubtless ought be analyzed but, even given the license of FRAP Rule 28(g), must necessarily be beyond the scope of this brief.[29/] In light of the foregoing discussion,

28/ Before the Board, both petitioners relied extensively on Judge Ordman's analysis as to the purported difference between the "enlightened" ILWU attitude on the West Coast and the "intransigent" ILA attitude on the East Coast. But Judge Ordman based his purported difference almost entirely on a law journal article (Ross, "Waterfront Labor Response To Technological Change: A Tale of Two Unions", Lab. L. J., July 1970, 397); and as was demonstrated below, this article in turn based its conclusions largely upon a critical misreading of §8(c) of the 1959 ILA/NYSA Agreement in which the term "non-members" was erroneously substituted for "employer members" of NYSA. (For the text of 8(c), see p. 14 supra). Such a change totally distorts the meaning of §8(c) and, indeed, could well suggest a meaning to the entire Agreement that was clearly never intended. It may be that, recognizing this critical failing in the article, NYSA does not here rely on it at all and ILA cites it only in footnote (ILA Brief, pp. 42, 46). In any event, and as we also pointed out below, the effect of a holding that this case differs from California Cartage (because here the ILA was always so intransigent that it never abandoned its claim to the work) would be to reward the ILA for its long intransigence in preserving blatant make-work and featherbedding practices, while punishing the ILWU for having recognized its responsibilities to the public by denouncing and relinquishing such practices. We cannot imagine a more anomalous result.

29 / There are, however, two such issues that should in no event go unmentioned. The first concerns ILA/NYSA's analysis (NYSA Brief, pp. 37-39; ILA Brief, pp. 37-40), with which we totally disagree, of International Longshoremen's Association (U.S. Naval Supply Center), 195 N.L.R.B. 273 (1972). So far as we are concerned, the ILA's real and only objective there was to obtain the stripping and restuffing work at the pier; and as such, that case, as the Board so expressly found (196a, 198a), is comparable in all pertinent respects to the instant case. To be sure, the ILA did make a demand for all the Center's "loading" work. But we believe that this demand was no more than a clever bargaining gambit intended to demonstrate to the Navy just how nasty the ILA could be if its more modest demand for the stripping and stuffing work continued to be rejected. It is easy, of course, for NYSA/ILA now to conclude that Naval Supply was truly a "classical" 8(b)(4) situation. But the Board obviously did not ignore -- nor should this Court -- just how vigorously such a conclusion was resisted when that case was litigated. The second issue concerns the very recent decision in Humphrey v. ILA, 401 F. Supp. 1401 (E.D. Va. 1975). While both petitioners in their briefs (ILA Brief, pp. 26-27; NYSA Brief, p. 38 n. 20) rely on that decision to support their joint position here, we respectfully disagree with that decision and believe that it should, and will, be reversed on the appeal which is now pending.

however, there can be no question but that the Board's resolutions of the myriad of factually disputed questions in this case are very solidly supported by substantial evidence on the record considered as a whole.[30] Likewise, the Board's conclusions of law are equally as solidly supported. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). For these reasons, TEI respectfully urges the Court to hold that the ILA/NYSA activities in this case in fact violated the secondary boycott and hot cargo provisions of the Act, and to otherwise affirm the Board and fully enforce its order herein.[31]

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief have been served by first-class mail (or by hand delivery), this 23rd day of February, 1976, on the following parties of record in this proceeding: C. P. Lambos, Esq. (for NYSA); T. W. Gleason, Esq. (for ILA); J. Irving, Esq. (for NLRB); M. Schneiderman, Esq. (for CEI); J. W. Mangan, Esq. (for IBT Local 807); B. Simon, Esq. (for IBT Local 707); and H. Schulman, Esq. (for MPC).

_____
Allan I. Mendelsohn

30/ In light of the many disputed questions of fact which the Board was called upon to resolve and which are discussed throughout this brief, it is hard to understand how -- though not why -- NYSA urges on this Court that "the facts in this proceeding are not in dispute" and that the only issues facing the court are "pure questions of law" (NYSA Brief, pp. 7, 10 at n. 8). That this represents a questionable characterization of the litigation can hardly be gainsaid.

31/ In light of the decision by FMC Judge Morgan holding the container rules discriminatory and hence unlawful under the Shipping Act of 1916 (see n. 1 supra), it may well be that, though not previously discussed herein or by the Board in its decision, an independent ground for deciding this case rests on the Board's "right-to-control" doctrine. This doctrine holds that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand. As the FMC decision holds that it would be unlawful for carriers to enforce the rules, carriers truly lack the legal power to grant the ILA demands here; and the rules, therefore, violate §8(b)(4) on these independent grounds. See National Woodwork, 386 U.S. at 616, n. 3.

APPENDIX

RESPONDENTS' EXHIBIT "R-12" (AS MODIFIED)

Employment Statistics For
Longshoremen, Clerks, Checkers, etc.
Reported by New York Shipping Association

1	2	3	4	5	6	7
Contract Year Ending	Total Employees	Total Hours Worked	Total Wages	Total GAI Expense	Hours Worked Per Employee	Extrapolation of Total Employees Based Upon 1951-1954 Average*
9/30/51	48,791	44,415,934.5	$104,890,800	$	910.33	
9/30/52	51,282	44,260,828	108,527,518		863	
9/30/53	49,293	44,164,225	116,144,365		895	
9/30/54	41,333	37,813,991	102,061,108		914	
9/30/55	34,639	42,165,617.5	117,652,846		1217.29	47,081.91
9/30/56	31,645	46,094,411.5	132,909,540		1456.61	51,468.78
9/30/57	34,146	45,243,034	140,284,563		1324	50,518.14
9/30/58	31,629	42,835,226	133,466,933		1354	47,829.59
9/30/59	30,428	44,695,693.5	143,835,273		1468.90	49,906.98
9/30/60	29,767	43,270,227.5	144,855,716		1453.63	48,315.31
9/30/61	27,999	40,782,901.5	138,727,145		1456.58	45,537.98
9/30/62	27,134	42,023,133	145,533,208		1548	46,922.81
9/30/63	28,224	40,201,556.5	147,887,900		1424.37	44,888.85
9/30/64	25,542	42,148,092.5	157,455,521		1650.15	47,062.34
9/30/65	25,033	40,757,634	160,629,874	33,755	1628	45,509.76
9/30/66	24,825	43,695,543.5	175,112,163	1,717,757	1760.14	48,790.22
9/30/67	24,599	40,722,166	166,499,147	1,675,974	1655	45,470.16
9/30/68	23,565	39,844,741	169,961,891	3,070,219	1690	44,490.43
9/30/69	22,531	33,935,416	154,996,290	5,986,030	1506 **	37,892.11
9/30/70	19,962	32,853,146	161,063,292	24,340,472	1645	36,683.65
9/30/71	17,568	30,849,623	165,172,465	29,023,868	1756	34,446.53
9/30/72	16,741	22,627,084	132,197,865	33,493,141	1351 ***	25,265.29

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* The figures in this column were obtained by taking the average of the first four figures in Column 6 (i.e., 895.58) and dividing that average into the "total hours worked" figures in Column 3 for each year after 1954. Thus, taking 1955 as an example, we used the average 895.58 and divided that into the total hours worked in 1955 (i.e, 42,165,617.5) which yielded the figure of 47,081.91 being the number of longshore employees that would have been employed in 1955 if the per employee hours worked for 1955 had been equal to the per employee average of the four preceding years.

** During this 1968/1969 period, the 57-day strike occurred in advance of the signing, in February 1969, of the 1968 Agreement.

*** In 1972, there were only 10 months of longshore work, as a consequence of a 2-month strike.